88-1368

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

No. _____

WILLIAM T. CONNOLLY and
LIZABETH V. CONNOLLY,

Petitioners

v.

MARYLAND CASUALTY COMPANY,
a Maryland Corporation

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether questions of Florida law of great public importance should have been certified to Florida's Supreme Court for decision where there is no controlling Florida Supreme Court precedent and the decisions of Florida's intermediate appellate courts are inconsistent and conflicting?

II. Whether federal courts may, in effect, "abstain" from deciding an action for declaratory judgment raising constitutional and other issues of great public importance where a cause of action has been stated under both federal and state pleading standards?

III. Whether it was error to allow a state law to preempt federal law civil rights claims arising under 42 U.S.C. §§ 1985(2) and 1985(3) contrary to the United States Constitution and the decisions of this Honorable Court?

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit is unreported but is printed in appendix A hereto, infra, page 34. The judgment of the United States Court of Appeals for the Eleventh Circuit is reported at 849 F.2d 525 and is printed in appendix A hereto, infra, page 19. The order of the United States District Court, Southern District of Florida, Honorable Edward B. Davis, dated February 19, 1987, is unreported but is printed in appendix A hereto, infra, page 7. The order of the United States District Court, Southern District of Florida, Honorable Edward B. Davis, dated August 16, 1982, is unreported but is printed in appendix A hereto, infra, page 1.

JURISDICTION

The judgment of the United States Court of Appeals, Eleventh Circuit (appendix A hereto, infra, page 19) was entered on July 13, 1988. A timely petition for rehearing and suggestion of rehearing en banc and suggestion of certification to the Florida Supreme Court was denied on November 14, 1988 (appendix A, infra, page 34). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

Art. VI, § 2, U.S. Const.

Amend. V, U.S. Const.

Amend. VII, U.S. Const

Amend. XIV, U.S. Const.

Art. I § 2, Fla. Const.

Art. I § 5, Fla. Const.

Art. I § 21, Fla. Const.

Art. I § 22, Fla. Const.

28 U.S.C. § 2201

Fla. Stat. ch. 86

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STATEMENT OF THE CASE

WILLIAM CONNOLLY was rendered a quadriplegic and totally and permanently disabled by an on-the-job accident in 1969. WILLIAM CONNOLLY sought benefits from his employer and the employer's workers' compensation carrier, MARYLAND CASUALTY COMPANY. As a result of the accident, WILLIAM CONNOLLY was totally dependent upon his workers' compensation benefits to support himself, his wife LIZABETH, and their children. Six years later Respondent MARYLAND CASUALTY COMPANY used this dependency and the information it had gained about the fragile status of the mental health and marital stability of the CONNOLLYs to perpetrate a scheme, lasting several years, to induce severe mental and emotional distress in both WILLIAM and LIZABETH CONNOLLY, in order to extract a cheap full settlement of WILLIAM's worker's compensation claim.

The carrier sought to cut off its obligations to WILLIAM CONNOLLY, as under Florida law the carrier was then obligated to furnish extremely expensive medical benefits for the remainder of WILLIAM CONNOLLY's life.

The scheme included in-home surveillance, telephone calls, harassment, threats, deception and the making of fraudulent promises concerning the provision of a motorized wheelchair and a chair-lift equipped van, all with the intention of doing severe emotional harm to WILLIAM and LIZABETH CONNOLLY. The conduct of the Respondent was so extreme the CONNOLLYs received national attention for their story on the C.B.S. television program "60 Minutes" (June 13, 1982).

WILLIAM and LIZABETH CONNOLLY brought actions for tortious breach of insurance contract (Count I), fraud and deceit (Count II), intentional infliction of

severe mental and emotional distress (Counts III and IV), civil rights claims under 42 U.S.C. §§ 1985(2) and 1985(3) (Counts V and VI), and a for a declaratory judgment (Count VII). See appendix at 36 et. seq. The complaint, fairly read, alleges wilful and malicious breaches of duty.[1]

Counts I through VI initially survived a motion to dismiss for failure to state a cause of action.[2] Count VII was subsequently added following Florida's Third District Court of Appeal's decision Old Republic Ins. Co. v. Whitworth, 442 So.2d 1078 (Fla. 3d DCA 1983). Count VII is an action for declaratory relief raising constitutional and other issues and is based upon the standard Form 18 for

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[1] Order of Edward B. Davis dated August 16, 1982. See appendix at 3-4.

[2] Order of Edward B. Davis dated August 16, 1982. See appendix at 1.

declaratory relief, and is sufficient pursuant to Fed.R. Civ.P. Rule 84.

On the eve of trial, based upon Old Republic, supra, the District Court dismissed all counts of the complaint with prejudice for failing to state a cause of action.[3] The Order was appealed to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit held as to Counts I, II, III, and IV that Florida's Workers' Compensation Act provides the exclusive remedy for employees' work-related claims and that a court is without jurisdiction to address the claims of an employee and his spouse against a workers' compensation carrier for additional damages and injuries.

As to Counts V and VI based on federal civil rights laws and as to Count VII, a declaratory action, the Court held that

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[3] Order of Edward B. Davis, dated February 19, 1987. See appendix at 7.

absent the state law claims, there cannot be federal claims maintained in the courts. In essence, the court's opinion is that the exclusive remedy portion of Florida's Workers' Compensation Act (hereafter referred to as the Act) precludes any type of civil action against a workers' compensation insurance carrier, including statutory federal civil rights claims and a declaratory judgment claim, and is determinative of the entire cause pending before the federal court.

Petitioners assert three arguments which justify certiorari: 1) Given the circumstances -- the importance of the issue of state law and the confused state of the law -- the Eleventh Circuit should have certified the state law issues to the Florida Supreme Court; 2) Petitioners were entitled to a declaratory judgment as to the constitutionality of portions of the workers' compensation act regardless of

the exclusive remedy provision of the Act, and 3) Even if the state law remedies are exclusive, they do not preempt federal civil rights laws and cannot deprive the federal courts of jurisdiction over said actions because of the supremacy clause of the U.S. Constitution.

REASONS FOR GRANTING WRIT AND FOR CERTIFICATION TO THE FLORIDA SUPREME COURT

I. Questions of Florida law of great public importance should have been certified to Florida's Supreme Court for decision where there is no controlling Florida Supreme Court precedent and the decisions of Florida's intermediate appellate courts are inconsistent and conflicting.

The Eleventh Circuit Court of Appeals refused to certify questions of law to the Florida Supreme Court[4] as to whether the

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[4] Certification would have been entirely proper under Florida law as there is an absence of a controlling precedent in the Florida Supreme Court. See Art. V, § 3(b)(6), Fla. Const; Fla.R.App.Pro. 9.030 (a)(2)(C), Fla.R.App.Pro. 9.150 (a).

Florida Workers' Compensation Act's[5] (1969) exclusivity provision precludes actions against a worker's compensation carrier for tortious breach of insurance contract, fraud and deceit, intentional infliction of severe mental and emotional

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[5] A review of the origins of the workers'compensation system as it developed in Florida and throughout the United States indicates that ... Beginning with New York in 1910, the states began to enact workers' compensation laws. By 1920, the process of legislative reform had gone so quickly that all but eight states had enacted workers' compensation acts. Florida was one of the last states to adopt the workers' compensation systems for industrial injuries and death, in the 1935 "Florida Workman's Compensation Act," [citation omitted].

The fundamental purpose of the workers' compensation act was to provide the victims of industrial accidents with some compensation for loss of wage-earning capacity. The purpose of the workers' compensation act was to remedy the harshness of the common law, which left most of the victims of industrial accidents destitute.

Lipman, "Will the Courthouse Doors be Open?" 63 The Florida Bar Journal, 59, 60 (January 1989).

distress, federal civil rights claims and a declaratory judgment of the constitutionality of the exclusive remedy provision of the Act.

This Honorable Court should now certify said question(s) of law to the Florida Supreme Court for decision.

THE STANDARD FOR CERTIFICATION

In Lehman Brothers v. Schein, 416 U.S. 386, 94 S.Ct. 1741 (1974), petitioner brought suit on the basis of diversity[6] jurisdiction, 28 U.S.C. § 1332(a)(1). In Lehman the District Court examined Florida law. Finding no precedent in the Florida Supreme Court, the court considered Florida intermediate appellate opinions and determined that under Florida law the claim failed to state a cause of action

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[6] Under the progeny of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938), Petitioners herein as in Lehman should not be any less entitled to have an appropriate determination of Florida law.

and dismissed it.

The Court of Appeals, in Lehman, reading other Florida law, reached the opposite conclusion from the district court judge and found the Florida courts would probably view the complaint as stating a cause of action. Lehman, 416 U.S. at 389, 94 S.Ct. at 1743. On rehearing and for the first time,[7] the petitioners in Lehman requested that the Court of Appeals certify the question to the Florida Supreme Court. Lehman, 416 U.S. at 393, 94 S.Ct. at 1745 (Rehnquist, J., concurring). The request was denied.

On petition for certiorari this Honorable Court vacated the appellate court's opinion in Lehman and remanded the case so that the appellate court could

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[7] Florida law, here as in Lehman, supra, permits certification only from a United States Court of Appeal or the U.S. Supreme Court, thus it could not have been requested at the direct court level. See supra n.4.

reconsider certification to the Florida Supreme Court pursuant to that court's appellate rules. This Honorable Court's analysis in Lehman was that where the certification procedure is available and the question presented was unsettled in the state's opinions and the Court is ruling as outsiders (ie. not being located in the state) certification is "particularly appropriate." Lehman, 416 U.S. at 391, 94 S.Ct. at 1744. Thus, certification was, and still remains, a particularly appropriate means of resolving the key issues in the present case, as the Florida Supreme Court has not squarely addressed and resolved the key issues raised in this case and the Florida intermediate appellate opinions are confused or conflict.

This Court in Lehman also considered the significant effect the decision would have upon the citizens of the State of

Florida and the right of each state to determine its own law, and held the federal appellate court does not have the prerogative to choose what it thinks the state law is as the state is free to hold for either position. Lehman, 416 U.S. at 389, 94 S.Ct. at 1743. Thus a federal court should defer its opinion to the state court where the state provides for certification.[8]

The case sub judice is nearly identical to Lehman except that the need for certification here was and is more compelling, given the issue of "great public importance" involved and the compelling evidence that the Florida Supreme Court might hold contrary to the decision of the Eleventh Circuit in this case. See discussion infra, and Fisher v.

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[8] The procedure of certification is open to both the U.S. Supreme Court and all U.S. Courts of Appeal. Lehman, 416 U.S. at 390, 94 S.Ct. at 1743; supra n. 4.

Shenandoah General Construction Co. and Lawton v. Alpine Engineering Products, infra.

In a diversity case, such as this, where there is no controlling Florida Supreme Court precedent, where the issues are uncertain and conflicting, where in the Florida intermediate appellate courts there is a clear indication that the key issues are matters of great public importance, and where the action involves a dismissal for the failure to state a cause of action under Florida law and the question to be certified could establish the complaint as proper, the court should have deferred ruling pending certification to the Florida Supreme Court. Lehman, supra; see also Kaiser Steel Corp. v. W.S. Rant Co., 391 U.S. 593, 88 S.Ct. 1753 (1968), (where this Court reversed the failure of the appellate court to abstain from deciding state law issues and have

them certified). Moreover, certification to the Florida Supreme Court by this Court at this time is also appropriate and desirable.

THE NEED FOR CERTIFICATION: UNCERTAIN STATE LAW

OVERVIEW

If the fundamental questions raised in this case are resolved favorably to our Petitioners, it would have a profound impact on the way injured workers in Florida and perhaps elsewhere are treated by their employers' insurance carriers.

Both the District Court and the Eleventh Circuit misperceived the gravamen of the factual allegations. Both courts found that the conduct of the insurance carrier was the equivalent of the mere delay in paying benefits. Quite the contrary, the egregious conduct of the carrier was designed to destroy the Petitioners if they did not settle cheap;

moreover, the carrier's conduct drove Mrs. Connolly to attempt suicide and resulted in the divorce of the marriage of the Petitioners. Many state Supreme Courts have, on a number of grounds found that such conduct by a carrier is not immune, nor related to furnishing benefits. See footnote 10.

If the lower courts' decision is not addressed by this Court, it appears that in Florida, an employee and an employee's spouse are precluded from bringing a common law action against a carrier for intentional and malicious torts (such as intentional infliction of emotional distress, fraud, defamation, false imprisonment, invasion of privacy, and sexual harassment.) Such a decision is a matter for the state's courts.

Both the trial opinion and appellate opinion in this case relied upon one authority: Old Republic v. Whitworth, 442

So.2d 1078 (Fla. 3d DCA 1983). Old Republic is a case at odds with other Florida decisions, as will be argued more fully infra.[9] Since the time Old Republic was decided, other Florida appellate opinions have been published which suggest the Third District's opinion is not Florida law. See, Morton v. U. S. F. & G. Insurance Co., 525 So.2d 470 (Fla. 4th DCA 1988); Bowen v. Aetna Life & Casualty Co., 512 So. 2d 248 (Fla. 3d DCA 1987); and discussion infra.

Also, since Old Republic, the issue of

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[9] Additionally, Old Republic is easily distinguishable on the basis of 1) different applicable statutory law at issue -- the scheme for providing a statutory remedy had changed considerably since 1969 (the law governing this case) when Mr. CONNOLLY was injured; when the Court decided Old Republic, after considerable change in the remedies, a remedy within the worker's compensation system was available, had been sought, and was actually provided to the plaintiff in Old Republic. 442 So.2d at 1082. The CONNOLLYs neither applied for nor obtained any type of workers' compensation remedy for the carrier's gross misconduct.

employer liability outside the Act for intentional torts has been raised to the Florida Supreme Court at which time the majority (four justices) avoided the issue, but the three dissenting justices addressed the issue of the workers' compensation exclusivity for intentional torts and sided with the employee and with the great number of other jurisdictions[10]

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[10] See Holman v. Liberty Mutual Insurance Company, 712 F.2d 1259 (8th Cir. 1983); Hayes v Aetna Fire Underwriters, 609 P.2d 257 (Mont. 1980); Coleman v. American Universal Insurance Co., 86 Wis.2d 615, 273 N.W.2d 220 (Wisc. 1979); Gibson v. National Ben Franklin Ins. Co., 387 A.2d 220 (Me. 1978); Stafford v. Westchester Fire Insurance Company of New York, Inc., 526 P.2d 37 (Alaska 1974); Reed v. Hartford Accident & Indemnity Co., 367 F.Supp. 134 (E.D. Pa. 1973); Unruh v. Truck Insurance Exchange, 498 P.2d 1063 (Cal. 1972); Lavin v. Goldberg Building Material Corp., 87 N.Y.S.2d 90 (App. N.Y. 1949); Southern Farm Bureau Casualty Insurance v. Holland, 469 So.2d 55 (Miss. 1984); Kaluza v. Home Insurance Company, 403 N.W.2d 230 (Minn. 1987); Franks v. U.S. Fidelity & Guaranty Co., 718 P.2d 193 (Ariz. 1985); Travelers Insurance Co. v. Savio, 706 P.2d 1258 (Colo. 1985); Kofra v. Amoco Chemicals Corp., 441 A.2d 226 (Del. 1982); Correa v. Pennsylvania Manufacturers Assn. Insurance Co., 618

deciding there is no such exclusivity nor immunity from suit as to intentional torts. Fisher v. Shenandoah General Construction Company, 498 So.2d 882 (Fla. 1986) (dissent)[11] and the companion case of Lawton v. Alpine Engineering Products, Inc., 498 So.2d 879 (Fla. 1986) (dissent).[12] Should any one of the remaining four Florida Supreme Court

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F.Supp. 915 (Del. 1985); Broaddus v. Ferndale Fastener Division, 269 N.W.2d 689 (Mich. 1978); Baylint v. Arkansas Best Freight System, Inc., 18 Ohio 3d 126 (1875); Blankenship v. Cincinnati Chemical, 433 N.E.2d 572 (Oh. 1982), cert. denied, 459 U.S. 857, 103 S.Ct. 127 (1983); Champion v. U.S. Fidelity & Guaranty Co., 399 N.W.2d 320 (So.Dak. 1987); Aranda v. Insurance Co. of West America, 748 S.W.2d 210 (Tex. 1985); Mandolidis v. Elkin Industries, 24 S.E.2d 907 (W.Va. 1978); Wade v. Johnson Controls, Inc., 693 F.2d 19 (2d Cir. 1982).

[11] While the dissent's opinion is cited, this is only because the majority held that intentional torts were not stated and thus the majority did not reach the issue of exclusivity. See infra.

[12] Id.

Justices agree with the three "dissenting" Justices of the Florida Supreme Court, Old Republic would be overturned.

Decisions previous to Old Republic also suggest the complaint herein states a cause of action. See e.g., Sullivan v. Liberty Mutual Insurance Company, 367 So.2d 658, 661 (Fla. 4th DCA 1979) (where the court held in dicta allegations that a workers' compensation carrier acting to intentionally harm the employee would fall outside the scope of the Act). This combines with our lower court's prior determination (referenced at footnote 2, supra) that the complaint herein fairly alleges malicious and intentional torts, and that the CONNOLLYs fall outside the scope of [illegible] compensation scheme.

DISCUSSION

The Eleventh Circuit in reaching its conclusion, failed to recognize and/or failed to correctly interpret a number of

significant opinions of Florida jurisprudence on the issue. In Bowen v. Aetna Life & Casualty Co., 512 So.2d 248 (Fla. 3d DCA 1987), a worker whose injury was covered under the federal workers' compensation law[13] sued the worker's compensation carrier for intentional torts, including the refusal to pay benefits. The Court in Bowen held that valid causes of action for intentional tort were stated.

Contrary to our lower courts' view Bowen primarily involved the question of whether causes of action for intentional torts could be maintained against a workers' compensation insurance carrier

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[13] The federal workers' compensation law is essentially the same as Florida's Workers' Compensation Law with regard to the exclusivity of liability and immunity from suit provisions. Therefore, the question in Bowen, like the present case, was whether Florida common law permitted jurisdiction as to the causes of action pled.

under Florida law. See Florida Workers' Compensation Practice, 3d Ed. (The Florida Bar, July 1988), Supp. § 8.34. Thus, Bowen, supra, supports a reversal herein.

The Eleventh Circuit disregarded the supplemental authority submitted by Petitioners as part of their suggestion for certification to the Florida Supreme Court, i.e., Morton v. U. S. F. & G. Insurance Co., 525 So.2d 470 (Fla. 4th DCA 1988), in which Florida's Fourth District Court of Appeal sustained an independent cause of action brought by a workers' compensation claimant for intentional tort, including the insurer's failure to pay benefits, against a workers' compensation carrier; thus said claims were not precluded by the Florida Workers' Compensation Act.

Thus, even were Old Republic, supra, the law in Florida's Third District, the law became unsettled when that court

subsequently decided in Bowen, supra, that a cause of action was stated. Similarly, the Morton decision in Florida's Fourth District Court of Appeal further indicates, as Petitioners have argued, that Old Republic was wrong or at least not controlling.

Florida's First District Court of Appeal has also addressed the issue of workers' compensation exclusivity and intentional torts. Brown v. Winn-Dixie Montgomery, Inc., 469 So.2d 155 (Fla. 1st DCA 1985) (en banc) and Schwartz v. Zippy Mart, Inc., 470 So.2d 720 (Fla. 1st DCA 1985) (en banc). These cases, at first blush would seem to offer support for the proposition that exclusivity applies even as to intentional torts. However, that superficial conclusion is inaccurate. In reality, nearly all of the foregoing opinions, when read carefully, fully support the proposition that no

exclusivity existed against an employer for true intentional torts, such as those pled in our present case. In Brown, a plurality of five justices held that a supervisor's sexual harassment of an employee was not an intentional tort by the employer under the facts presented in that case and thus the Plaintiff was precluded from claiming a remedy outside of the workers' compensation system. Id. at 156. A second plurality of four justices held that the workers' compensation exclusivity did not bar the action.(Smith, J.). Id. at 163. A third opinion was that the employer did not have sufficient knowledge to deem its actions intentional, but if the actions were intentional, the workers' compensation act would not protect the employer. (Wentworth, J.). Id. at 160. The fourth opinion held that a claim for intentional infliction of emotional distress (and

other non-physical torts) would fall outside the ambit of coverage under the Act. (Ervin, C.J.). Id. at 161-162.

In Schwartz, 470 So.2d at 720, the plurality held that based upon the pleadings, depositions, admissions and affidavits which provided no proof of wantonness, wilfulness or malice by the employer, the employer could be guilty of no more than simple negligence.[14] Thus, the Act was the exclusive remedy for the injuries. The court went on to say:

> [a]n employer, of course, cannot intentionally injure an employee and enjoy immunity from suit.

Id. at 714.

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[14] Two opinions held the allegations did not properly plead intentional torts by the employer. (Wentworth, J.) and (Nimmons, J.). Id. at 725. A second plurality of four specifically held the exclusivity provision did not preclude a separate action in the courts for the intentional tort of sexual harassment. (Smith, J.).

The significance of these decisions, notwithstanding the result reached, is that where a workers' compensation claimant sufficiently pleads an intentional and malicious tort, especially if the torts are of an emotional and non-physical nature, a cause of action is stated which is not precluded by the exclusivity or immunity provisions of the Act. Our Petitioners fall under this category and thus fall outside the workers' compensation act.

Finally, two dissenting opinions of the Florida Supreme Court further reveal the pressing need to certify this matter to the Florida Supreme Court for decision at this time.

In Fisher v. Shenandoah General Construction Company, 498 So.2d 882 (Fla. 1986) and the companion case of Lawton v. Alpine Engineering Products, Inc., 498 So.2d 879 (Fla. 1986), Florida's Fourth

District Court of Appeals certified a question to the Florida Supreme Court as being of great public importance. The question was whether Florida's Workers' Compensation Act precludes civil actions against employers for intentional torts within the scope of their employment. That question was left unanswered.[15]

In both Lawton and Fisher a majority (four of seven justices) of the Florida Supreme Court held that since the acts committed by the employer as pled in those cases, were not, in fact, true

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[15] The question that would be certified in the case sub judice is equally of great public importance and may be stated as:

> Does the Florida Workers' Compensation Act preclude all civil actions against worker's compensation insurance carriers for intentional and malicious torts and other theories of recovery regarding conduct of the carrier after the employment relationship has ended, and if so, is this permissible under the Florida Constitution, Art. I § 5, Art. I § 21 and Art. I § 22?

intentional torts, the certified question need not be answered. Three justices held that not only were there intentional tort claims presented but that an action for intentional tort was not precluded by the exclusive remedy provision of the Workers' Compensation Act[16]; the four remaining justices did not address this second question discussed by the dissenting justices.

In this case, both intentional and malicious torts and federal civil rights claims have been pled and all three of the Florida Supreme Court justices who have addressed the question would presumably rule in favor of Petitioners herein. Should any one of the four justices who have not yet expressed their opinions

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[16] The appellate opinion specifically recognizes the justices' position, appendix at 26, but apparently the Eleventh Circuit knows more about Florida law than the Florida courts.

regarding the question as to liability for intentional torts agree with those three, Florida law would be contrary to the finding of the lower federal courts herein and Florida's intermediate appellate decision in Old Republic. Based upon such an unsettled area of law, the Eleventh Circuit improperly failed to certify the issues of Florida law raised herein to the Florida Supreme Court as it is Florida's prerogative (not the federal courts') to decide such an issue of great public importance of state jurisprudence.[17]

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[17] The Honorable Chief Justice of the Fifth Circuit wrote (paraphrased):

> Where federal judges are forced to apply state substantive law in diversity actions rather than have the judges trade the judicial robes for the garb of prophet and merely forecast or guess at state law, it is preferable to avoid the embarrassment of the courts and the frustration of the litigants by certifying the issue of state law to the state court.

Brown, John R. 7 Cumberland Law Review, 455 (1977).

Even before Old Republic, supra, Florida cases suggested that the worker's compensation system does not offer immunity to employers or carriers who commit intentional torts. In Sullivan v. Liberty Mutual Insurance Company, 367 So.2d 658, 661 (Fla. 4th DCA 1979) the court stated in dicta with regard to carriers' immunity under Fla. Stat. § 440.11(2):

> It would appear that the immunity granted under the statute was not intended to cover instances where a carrier intentionally harms the employee. [Emphasis added].

The case sub judice falls within these guidelines -- the torts alleged are intentional, deliberate, and malicious conduct on the part of the carrier against the employee and his spouse. See appendix at 3-4.

Aside from specific cases indicating that intentional torts are not included under the workers' compensation scheme,

the policy of the Workers' Compensation Act is to exclude recovery for: (a) non-physical injuries,[18] (b) intentional acts,[19] and (c) injuries not arising from and in

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[18] It is well settled Florida law that emotional injuries not directly connected with job-related physical injury are excluded from the workers' compensation act and are the proper subject of a civil action and not barred by the exclusive remedy arising under the Act. Danes v. Sun Banks of Orlando, 412 So.2d 937 (Fla. 1st DCA 1982); Williams v. Hillsborough County School Board, 389 So.2d 1218 (Fla. 1st DCA 1980). (In Williams a teacher alleged severe mental injury due to a course of abusive treatment from a conspiracy between her students and her employer. The woman's emotional injuries were determined not compensable under the Florida Workers' Compensation Act and therefore were the proper subject of a civil action for damages. Similarly, the plaintiff's spouse could also recover outside the Workers' Compensation law.) Lipman, 63 The Florida Bar Journal, at 59-60. Other cases suggest the Eleventh Circuit's reliance upon Old Republic is misplaced. See Superior Mill Work v. Gable, 89 So.2d 794 (Fla. 1956); Watson v. Melman, Inc., 106 So.2d 433 (Fla. 3d DCA 1958).

[19] See definitions of "Injury", Fla. Stat. §440.02(6) and "Accident", Fla. Stat. §440.02(19)(1969).

the course of employment.[20]

It is difficult to conceive of how the Respondent's wrongful conduct alleged to have occurred many years after employment had ended could be construed to be "in the course of employment."[21] Given the fact that the injuries and conduct complained of herein occurred many years following

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[20] The injury must "arise out of and in the course of employment [emphasis added]". Fla. Stat. §440.09(1)(1969). The actions complained of and the resulting injuries arose for WILLIAM CONNOLLY several years after he had been unemployed. As to LIZABETH CONNOLLY, her injuries were not the result of any employment. LIZABETH CONNOLLY's actions herein are not derivative. She is not seeking loss of consortium, she seeks recovery for the actions done directly to her and therefore her conduct should not be barred by the exclusivity provision even if her husband's are determined to be barred.

[21] Petitioners have asserted at all times that the carrier's conduct was outside the scope of employment. This further distinguishes the instant case from the pluralities in Brown and Schwartz and the majorities in Fisher and Lawton; and indicates the complaint herein states a cause of action.

the termination of WILLIAM CONNOLLY's employment and were perpetrated by the employer's carrier and did not arise from the injury for which WILLIAM CONNOLLY made his initial claim for benefits, the actions herein were not covered by the Workers' Compensation Act and properly stated a cause of action outside of the ambit and coverage of the Act.

It is also well-settled Florida law that if injuries are not specifically compensable under the workers' compensation act the injured are free to pursue remedies outside the workers' compensation scheme. Grice v. Suwanee Lumber Manufacturing Co., 113 So.2d 742 (Fla. 1st DCA 1959).[22] Therefore the

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[22] Professor Larson, author of the highly respected and authoritative treatise [Larson, The Law of Workers' Compensation, 1985] on workers' compensation [law], writes that the workers' compensation act and its exclusivity provision apply only to those claims within what he calls the basic coverage formula for the workers'

injuries herein were not covered and Petitioners' remedy was properly in the court system.

That the law in Florida is unclear as to the extent of applicability for the exclusive remedy portion of the workers' compensation act is only part of the story. The Eleventh Circuit in arbitrarily selecting Old Republic v. Whitworth as the cornerstone of its opinion has ignored the fact that Old

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> compensation acts--"personal injury by accident arising out of and in the course of employment." In other words, while it is accurate to state that the workers' compensation act has been liberally construed to provide employees with compensation for covered injuries and death at the workplace, it is completely inaccurate to expand the exclusivity provisions of the Workers' Compensation Act to subsume common law and statutory causes of action providing remedies for matters which are clearly outside the remedies, doctrine and purpose of the workers' compensatory statutory reform.

As quoted in Lipman, 63 The Florida Bar Journal at 60.

Republic applied a largely amended version of Florida's Workers' Compensation Act, which amended version included a new remedy scheme for the bad faith actions of a carrier, not in effect in 1969.[23]

To the extent the Workers' Compensation Act applies, the injuries herein are governed by the 1969 Workers' Compensation Act. While the Eleventh Circuit's opinion herein asserted that a carriers' immunity from suit existed in 1969 and before, the only case law they

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[23] It is well settled that the substantive rights of the parties herein are fixed and governed by the workers' compensation law in effect at the time of Petitioner's industrial injury. In the present case, that is the 1969 version of the Act. Green v. United States, 376 U.S. 149, 84 S.Ct. 615 (1964); Lumberman's Mut.Cas.Co. v. Cebellos, 440 So.2d 612 (Fla. 3d DCA 1983); Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239 (Fla. 1977); Simmons v. City of Coral Gables, 186 So.2d 493 (Fla. 1966); Sullivan v. Mayo, 121 So.2d 424 (Fla. 1960); Hyatt v. Armstrong Cork Co., 121 So.2d 793 (Fla. 1960); Phillips v. West Palm Beach, 70 So.2d 345 (Fla. 1953).

were able to cite are cases reflecting an immunity from suit only for a carrier's negligence in conducting job-site safety inspections; for carriers from negligent, not for intentional acts. See Carroll v. Zurich Insurance Company, 286 So.2d 21, 22-23 (Fla. 3d DCA 1973), app. dismissed 297 So.2d 568 (Fla. 1974). Said cases are inapplicable.

In fact, Florida courts have held the Workers' Compensation Act would appear not to preclude actions for intentional torts in the courts. Florida Erection Services, Inc. v. McDonald, 395 So.2d 203, 208 (Fla. 1st DCA 1981); Sullivan, 367 So.2d at 661.

This Court has consistently held that where a federal court of appeals cannot make a confident decision on how a state supreme court would construe a state statute, such issues should be resolved by certification to the state supreme court where state law permits the appellate

court to do so. See Clay v. Sun Insurance Office, 363 U.S. 207 (1960).

Given the unique interest Florida has in its workers' compensation act, the lack of uniformity in Florida intermediate appellate decisions, the absence of a controlling precedent of the Florida Supreme Court and the opinions of the several Florida Supreme Court justices referred to supra, the Eleventh Circuit could not possibly have made a confident decision as to the state law[24] and should have certified[25] the issues raised herein

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[24] This is an Erie diversity case, and not an ordinary one, but one involving issues of peculiar concern to the State of Florida, unlike an ordinary contract action. The core of the public policy of Florida's Workers' Compensation Act may be decided by this case. It is essential that such a decision be made by the authoritative body of Florida law. See additional discussion of the standards of certification in State of Florida v. Exxon Corp., 526 F.2d 266, 274-276 (5th Cir. 1976).

[25] The Fifth Circuit has held:

When a state law is in doubt,

to the Florida Supreme Court as requested.[26]

Given the considerable issues involved in this case attempting to address what exclusivity and immunity the state legislature intended to extend to workers' compensation carriers for intentional torts and given the unsettled nature of Florida law which is of great public importance to the state, the Eleventh Circuit's conduct in failing to certify

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> especially on the underlying public policy aims, it is in the best administration of justice to afford the litigants a consistent final judicial resolution by using the certification procedure.

Barnes v. Atlantic & Pacific Life Ins. Co. of America, 514 F.2d 704, 706 (5th Cir. 1975). Even the Eleventh Circuit has held certification appropriate when Florida authority on the question is conflicting. Dorse v. Armstrong World Industries, Inc., 798 F.2d 1372, 1377 (11th Cir. 1986).

[26] It is significant that the CONNOLLY's claims did initially survive a motion to dismiss, decided before the Old Republic decision. See appendix at 1.

this matter to the Florida Supreme Court was inappropriate and tends to cause needless friction between state and federal authority in an area of state law which is of particular and exclusive interest to the State of Florida. See Lehman Brothers, supra, see also Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 79 S.Ct. 1070 (1959), (where the state's special interest in an area of state law, in that case eminent domain, was a matter for certification rather than one to be addressed by the federal courts); ITT Rayonier, Inc. v. Wadsworth, 528 F.2d 1033 (5th Cir. 1976) (where certification is made on the issue of homestead rights and constitutionality of applicable homestead rights). The resolution of this case by the Florida Supreme Court would impact upon the manner in which workers' compensation carriers treat claimants and their family members.

The burdens of certification in this case are not significant. The parties have fully briefed the issues many times and thus preparation for the issues before the Florida Supreme Court would be in all likelihood a mere compilation and distillation of all the arguments presented to the courts herein.

This Honorable Court should grant certiorari and remand for certification or certify the appropriate issue or issues of a carriers' immunity for intentional torts under Florida's compensation scheme to Florida's Supreme Court.

II. Federal courts may not, in effect, "abstain" from deciding an action for declaratory judgment raising constitutional and other issues of great public importance where a cause of action has been stated under both federal and state pleading standards.

Simply stated, Count VII for declaratory relief properly states a cause of action and should not have been

dismissed.[27] Under the liberal standard of Conley v. Gibson, 355 U.S. 41 (1957), a complaint may not be dismissed for failure to state a claim unless "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. at 45-46. Accordingly, the lower courts improperly failed to address and resolve the issues raised within the declaratory relief action.

The declaratory relief action follows standard Form 18 appearing in the Federal Rules of Civil Procedure for stating a declaratory relief action. Therefore it states a cause of action. Fed.R.Civ.Pro., Rule 84. Under Florida law, petitioners had a clear right to obtain declaratory relief. Ch. 86, Fla. Stat. (where any individual, including a worker's

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[27] 26 C.J.S. Declaratory Judgment § 34.

compensation claimant, may obtain a declaration of his rights and privileges); Florida Industrial Commission v. Neal, 224 So.2d 774 (Fla. 1st DCA 1969).

Abstaining from deciding an action for declaratory judgment because of a possible administrative remedy is not appropriate. Dept. of Transp. v. Morehouse, 350 So.2d 529 (Fla. 3d DCA 1977) cert. denied 358 So.2d 129 (Fla. 1978).

In an action challenging the jurisdiction of an administrative agency and the constitutionality of the statute on which the administrative action was based, it has been held that the plaintiff was not required to exhaust his administrative remedies before pursuing such action where the questions involved were purely legal so that administrative expertise would be of no real value. 22A Am.Jur. 2d Declaratory Judgment, § 91 at n.91.

Both lower federal courts erred by failing to find that Count VII properly stated a cause of action and by failing to adjudicate same.

As to the declaratory judgment action, the trial court construed it as one seeking a declaration that the 1969 Act applied, rather than the 1981 Act; while true in part, this ignores the various additional substantive constitutional and other issues raised within Petitioners' claim for a declaratory judgment.

Assuming, arguendo, exclusivity operates as the Eleventh Circuit interpreted it, then the Court must still address whether a remedy, if any, within the compensation system as an alternative to the court

system is reasonable[28] and whether or not the exclusive remedy provision of the Act is unconstitutional and/or unconstitutional as applied to the facts sub judice for the deprivation of Petitioners' right of access to the courts and right to remedy for injuries suffered by them provided by Article I, §§ 5 and 21 of the Florida Constitution and the rights to equal protection and due process guaranteed by Article I, §§ 2 and 5 of the Florida Constitution and the First, Fifth, and Fourteenth Amendments to the United States Constitution.

In other words, the exclusivity provision of the Act does not defeat Petitioners' right to obtain declaratory

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[28] Petitioners assert the remedy is inadequate, a point which has been argued upon by various state supreme courts. See, Aranda v. Insurance Co. of West America, 748 S.W.2d 210 (Tex. 1985); Coleman v. American Universal Insurance Company, 273 N.W.2d 220 (1979).

relief on the constitutional issues raised.

Further, if the petitioners prevail on their constitutional claims, and it is found unconstitutional to preclude them from seeking their common law and civil rights claims, then those claims should thereafter proceed to trial.

By analogy, the Florida courts have permitted such a constitutional attack regarding the same exclusivity statute at issue here, § 440.11(1), Fla. Stat., as to the constitutional right against the impairment of contract. In City of Clearwater v. L.M. Duncan & Sons, Inc., 466 So.2d 1116 (Fla. 2d DCA), aff'd 478 So.2d 816 (Fla. 1985), the court held the exclusive remedy provision of Florida's Workers' Compensation Act was unconstitutional as applied to any indemnification contract. The entitlement to a declaration with respect to the

claims raised herein has been ignored by our lower courts. A declaration concerning the constitutional issues raised sub judice is required.

While Petitioners could address the standards for each constitutional argument, for brevity's sake they address only the right to access to the courts and right to remedy for injury. Kluger v. White, 281 So.2d 1 (Fla. 1973), formulated the test to be applied in determining whether a statute is violative of the right of access to courts provision of the Florida Constitution, and provided, in pertinent part:

> ... where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat., § 2.01, F.S.A. [sic], the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people

> of the State to redress for injured, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown. [Emphasis supplied.]

281 So.2d at 4.

More precisely, a state's legislature may abolish the right to access to the courts[29] in two instances: (1) where it authorizes a reasonable alternative for the redress of injuries or (2) where it can demonstrate an overpowering public necessity for abolishing such a right. Here, Petitioners' common law intentional tort and federal civil rights claims were determined to be eliminated by the application of "immunity from suit" and

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[29] In the present case, this also has the concomitant effect of depriving Petitioners of their right to jury trial as assured by the Florida Constitution, Article I, § 22, and the United States Constitution, Amendment VII, which Petitioners further argue is impermissible.

"exclusivity of liability" provisions of Florida Statutes, §§ 440.11(2) and 440.11(3). Respondent has throughout the proceedings been unable to cite even one authority which holds that federal civil rights claims are eliminated by Florida's Workers' Compensation Act.

Moreover, Petitioners have not received a declaration that a reasonable alternative remedy was afforded to them to redress said federal statutory civil rights within the workers' compensation system, as is sought by the declaratory action. This cannot be argued, in any event, as the administrative body does not have jurisdiction over said claims.

It is axiomatic that the gist of a declaratory judgment action is not whether a plaintiff will be ultimately successful in reaching a particular conclusion or achieving a particular remedy, the issue is whether a justiciable claim has been

made. Florida Industrial Commission v. Neal, 224 So.2d 774 (Fla. 1st DCA 1969) (where existence of possible remedy within the state workers' compensation scheme did not prevent a plaintiff's right to a declaration of her rights).

The declaratory relief claim (Count VII) properly stated a cause of action[30] and its dismissal was improper. This Honorable Court should accept certiorari and definitively either: (1) remand for a certification to the Florida Supreme Court for a determination the constitutional issues raised within the declaratory relief action, or (2) determine said issues itself.

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[30] Interestingly enough, the Eleventh Circuit held the District Court properly denied the Appellants' Motion for Summary Judgment as to the declaratory relief action. It is difficult to conceive of how the court could reach the propriety of the summary judgment issue if the count failed to state a cause of action.

If the exclusivity of liability and immunity provisions of the Act are found to be unconstitutional or otherwise not to preclude Petitioners' common law and civil rights claims, the said claims should be reinstated and should proceed to trial.

III. It was error for the court to allow a state law to preempt federal law civil rights claims under 42 U.S.C. §§ 1985(2) and 1985(3) contrary to the United States Constitution and the decisions of this Court.

Count V, an action under 42 U.S.C. § 1985 (2) is based upon the Respondent and a non-party, Risk Management Services, Inc. joining and conspiring for the purpose of impeding, hindering, obstructing and defeating the due course of justice in the State of Florida intending to deny Petitioners their rights and to injure Petitioners for lawfully enforcing and attempting to enforce their rights.

As to Count VI, Petitioners sought a remedy for the Respondent's invidious conspiracy and scheme to deprive Petitioners of the equal protection under the laws and equal privileges and immunities under the laws. The lower court held as to both Counts V and VI that

> [a]ccording to the dictates of the Old Republic decision, these allegations cannot overcome the exclusivity of the Workmen's Compensation Act.

See appendix at 13.

The supremacy clause, Art. VI, § 2, U.S. Const., makes federal law supreme notwithstanding any state law. The underlying rationale of the preemption doctrine, as stated more than a century and a half ago, is that the supremacy clause invalidates state laws that "interfere with or are contrary to, the laws of congress ..." Gibbons v. Ogden, 9 Wheat 1, 211, 6 L.Ed. 23 (1824).

The Florida Worker's Compensation Act

cannot interfere with Petitioners' rights arising pursuant to Acts of Congress. Sperry v. State of Florida ex rel. Florida Bar, 373 U.S. 379, 83 S.Ct. 1322 (1963); Nash v. Florida Industrial Commission, 389 U.S. 235, 88 S.Ct. 362 (1967).

Chapter 440 et seq., Florida Statutes, regardless of what it purports to do, is preempted by Petitioners' federal civil rights and federal constitutional right claims. Cf. Marassi v. Shorty, 70 F.R.D. 14 (E.D.Pa. 1976).[31]

Therefore, notwithstanding the Eleventh Circuit's holding, even if the Petitioners' exclusive remedy for common law actions lies within Florida's Workers'

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[31] At least one Florida appellate judge has recognized that even were the exclusivity provision a bar the common law claims it could not affect the federal civil rights claims. Brown, 469 So.2d at 160, (Ervin, C.J., dissenting) (where the opinion indicates even if exclusivity exists it does not affect Title VII of the Civil Rights Act as amended).

Compensation system, the state exclusivity provision cannot affect the Petitioners' federal civil rights claims under the supremacy clause of the United States Constitution. It was thus error to dismiss Counts V and VI for failure to state a cause of action.

CONCLUSION

The Court has before it issues of great importance to the State of Florida, to-wit: can a former employee and his wife be constitutionally restricted to workers' compensation remedies under Florida law when a workers' compensation carrier is alleged to have committed egregious intentional and malicious torts and federal civil rights violations against them?

This Honorable Court may elect to decide some or all of the issues raised herein or to certify some or all of the issues raised herein to the Florida Supreme Court.

The determination of this case may transcend mere public importance in Florida and profoundly impact on how workers' compensation insurance carriers treat claimants and their spouses throughout the United States. Now, nearly

half of the states allow causes of action similar to those presented herein to proceed outside of the workers' compensation system. The questions of first impression raised herein concerning the ability to maintain federal civil rights actions and the constitutionality of precluding common law intentional tort actions would have a national impact on the rampant abuse brought now, with impunity, by workers' compensation insurance carriers.

Petitioners have brought federal civil rights actions, the adequacy of which has not been questioned, but for the exclusivity provision. The lower federal courts herein determined that the state workers' compensation act preempts the federal statutory civil rights claims. The Supremacy Clause of the United States Constitution mandates that such cannot be the case. The state law, no matter how

well-intentioned, can never, ever, under any circumstances, interfere with or preempt proper federal legislation passed pursuant to the United States Constitution. The lower court's decision is wrong and should be reversed.

WHEREFORE, Petitioners respectfully pray this Honorable Court grant certiorari and determine the issues raised herein or certify some or all of the issues raised herein to the Florida Supreme Court as to workers' compensation exclusivity against a carrier for intentional and malicious torts, and as to the constitutionality of the exclusive remedy if it exists; and for determination on the declaratory judgment action, and reverse the dismissal of Counts V and VI for federal civil rights violations, and remand same so that those actions may continue pursuant to normal federal procedure.

Respectfully submitted,

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By: _____
ROGER M. DUNETZ, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for Writ of Certiorari and Appendix was mailed this 8th day of February, 1989 to James Tribble, Esq., Blackwell Walker Fascell & Hoehl, 1 S.E. Third Avenue, Suite 2400, Miami, Florida 33131.

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By: _____
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By: _____
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-959 - CIV - EBD

WILLIAM T. CONNOLLY, et al.,

Plaintiffs

vs.

MARYLAND CASUALTY COMPANY,

Defendant.

O R D E R

THIS MATTER is before the Court on the Motion of the Defendant to dismiss for lack of subject matter jurisdiction and failure to state a claim. The Court has reviewed the motion, memorandum of law and all opposing papers. Based upon an evaluation of the arguments presented, in light of the entire record in this case, it is

ORDERED AND ADJUDGED that the Motion to Dismiss is DENIED.

This action arises from the alleged tortious conduct of a workers' compensation carrier in connection with

the performance of an insurance contract. Florida law recognizes a separate and distinct cause of action for tortious breach of an insurance contract. Campbell v. Government Employees Insurance Company, 306 So.2d 525 (Fla. 1974); Butchikas v. Travelers Indemnity Co., 343 So.2d 816 (Fla. 1977). Therefore, it would appear that the exclusive remedy provisions of Florida's Workers' Compensation Law, Chapter 440, Florida Statutes, are not a bar to this action. See Sullivan v. Liberty Mutual Insurance Co., 367 So. 2d 658, 661 (Fla. 4th DCA 1979).

The direct action statute, 28 U.S.C. § 1332(c), does not divest this Court of jurisdiction for lack of diversity, since the Plaintiff is not suing upon the insurance contract itself and the liability sought to be imposed is not against the insured. Bourget v. Government Employees Insurance Company,

313 F. Supp. 367 (D. Conn. 1970); Walker v. Firemans Fund Insurance Company, 260 F. Supp. 95 (1966); see Hernandez v. Travelers Insurance Company, 489 F.2d 721 (5th Cir. 1974).

The Defendant's Rule 12(b)(6) arguments are also without merit. The allegations of the complaint are sufficient to state a claim for tortious breach of contract under Florida law. Count I alleges that the Defendant continuously refused to provide, as agreed, a specially equipped van to the quadriplegic Plaintiff, which refusal continued eleven months after a judicial determination by the Florida Supreme Court, and that the Defendant intentionally stopped making monthly payments which it had agreed to make to the Plaintiffs. Thus, fairly read, Count I states that the Defendant, knowing a claim to be valid and having previously agreed to and authorized benefits,

wilfully and maliciously refused to honor its agreement. More than bad faith has been alleged; the allegations are sufficient to withstand a 12(b)(6) motion. See Campbell, supra; Butchikas, supra.

With respect to Count II (fraud), the Defendant's position is only partially correct. Although a false statement amounting to a promise to do something in the future ordinarily is not actionable fraud, Cameron v. Outdoors Resorts of America, Inc., 608 F.2d 187, on rehearing, 611 F.2d 105 (5th Cir. 1979), where a party makes a promise without any intention to perform it and thereby induces another to enter into a transaction, liability for fraud arises. Home Seekers' Realty Co. v. Menear, 102 Fla. 7, 135 So. 402 (1931); Bernard Marko & Associates, Inc. v. Steele, 230 So.2d 42 (Fla. 3d DCA 1970). Here, the Count II allegations fall within these parameters

and meet the specificity requirement of Fed.R.Civ. P. 9(b).

Counts III and IV properly state claims for intentional infliction of severe emotional distress. Absent physical impact, a plaintiff can recover damages for mental anguish if it is shown that the defendant acted with such malice that punitive damages would be justified. Butchikas, 343 So.2d at 819.

The remaining arguments raised by the Defendants present issues that are outside the scope of a Rule 12(b)(6) motion, but which may be raised by affirmative defenses and be the proper subject of a motion for summary judgment as discovery develops.

DONE AND ORDERED at Miami, Dade County, Florida, this 16th day of August, 1982.

/s/

UNITED STATES DISTRICT JUDGE

Copies furnished to:

Robert C. Maland, Esq.
Benito Diaz, Esq.
Harold Solomon, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 82-0959-CIV-DAVIS

WILLIAM T. CONNOLLY and
LIZABETH CONNOLLY,

Plaintiffs

vs.

MARYLAND CASUALTY COMPANY,

Defendant.

ORDER DISMISSING SECOND AMENDED COMPLAINT WITH PREJUDICE AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER is brought before the Court on Defendant's Motion to Dismiss the Second Amended Complaint and Plaintiffs' Motion for Partial Summary Judgment. After a complete review of both Motions and consideration of the entire file, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is GRANTED and Plaintiffs' Motion for Partial Summary Judgment is DENIED as Moot.

On August 2, 1984, this Court dismissed

Counts II and III of Plaintiffs' original Complaint based on the Florida case of Old Republic Insurance Co. v. Whitworth, 442 So.2d 1078 (Fla. 3rd DCA 1983). Upon reconsideration, in an Order dated January 9, 1985, the Court dismissed the entire cause granting Plaintiffs leave to amend. Similarly, on December 13, 1985, this Court dismissed without prejudice Plaintiffs' First Amended Complaint, again basing dismissal on Old Republic's holding that Florida's Workmen's Com-pensation Act is the exclusive remedy available to those injured in the course of their employment. Fla. Stat. Section 440.11.

On December 23, 1985, the Plaintiffs filed a Second Amended Complaint in the above-styled action. The Court finds that this Complaint likewise fails to state a cause of action outside the scope of Florida's Workmen's Compensation Act. Based on the foregoing insufficiency of

Plaintiffs' third Complaint and the Court's determination that further leave to amend would unlikely cure the defects present in the Second Amended Complaint, the Court now dismisses this action with prejudice. See Feinberg v. Leach, 243 F.2d 64, 68 (5th Cir. 1957) (dismissal with prejudice affirmed where court afforded plaintiff three opportunities to plea a valid cause of action).

Dismissal of Plaintiffs' Second Amended Complaint is based on Old Republic Insurance Co. v. Whitworth, 442 So.2d 1078 (Fla. 3d DCA 1983). That case stands for the proposition that once an employee's injury is brought within the ambit of the Workmen's Compensation Act, any actions taken by the insurance carrier to delay payment, even if they are "outrageous, fraudulent, deceitful, or an intentional infliction of emotional distress" are outside the jurisdiction of this Court of

law. Id.

Not one of Plaintiffs' seven claims states a cause of action falling outside the purview of Florida's Workmen's Compensation Act and within this Court's jurisdiction.[1] Count I alleges tortious breach of an insurance contract for Defendant's failure to abide by an oral agreement for payment of benefits. Old Republic states that failure to timely pay benefits is a matter for the Division of Workmen's Compensation, not the courts. Couching that failure to pay in terms of breach of an oral contract is insufficient to escape the thrust of Old Republic.

In Count II of the Second Amended Complaint, Plaintiff WILLIAM T. CONNOLLY

[1] Florida's Workmen's Compensation Act provides "a comprehensive, exclusive and adequate administrative remedy for employees' work-related claims," thereby precluding courts from exercising jurisdiction over an employee's action for additional damages for injuries covered by the Act. Old Republic, 442 So.2d at 1079.

seeks damages for common-law fraud and deceit. Specifically, Count II alleges that Defendant deliberately made certain false representations to induce WILLIAM T. CONNOLLY into entering a settlement of his claims against the Defendant. A cause of action for fraud perpetrated in negotiating a contract of settlement and/or release of a claim is cognizable by the Florida Industrial Commission under Florida's Workmen's Compensation Act. Cf. State v. Florida Industrial Commission, 151 So.2d 636,640 (Fla. 1963) (fraud or mutual mistake). CONNOLLY's claim based on fraud and deceit clearly falls under the exclusive remedy clause of the Workmen's Compensation Statute. Old Republic, 442 So.2d at 1079 (characterizing insurer's alleged bad faith refusal to timely compensate claimant as fraudulent and deceitful is insufficient to avoid the exclusivity of

the Act).

In Counts III and IV, Plaintiffs seek damages for Defendant's intentional infliction of severe mental and emotional distress upon WILLIAM T. and LIZABETH V. CONNOLLY. In these counts, Plaintiffs complain of actions allegedly taken by the insurer in an attempt to fraudulently force WILLIAM T. CONNOLLY into a settlement of his Workmen's Compensation claim arising out of his job-related injury. Both of these claims must fail according to Florida's Third District Court of Appeal's holding in Old Republic. "[A] compensation claimant cannot avoid the exclusivity of the Act and transform a delay in payments into an actionable tort cognizable in the Circuit Court simply by calling that delay outrageous [and] ... an intentional infliction of emotional distress." Old Republic, 442 So.2d at 1079. Counts III and IV are

admittedly predicated on Defendant insurance carrier's refusal to timely compensate the Plaintiffs' [sic] for injuries under the Act. Accordingly, these injuries are indisputedly covered by Florida's Workmen's Compensation Act.

Similarly, Counts V and VI of the Second Amended Complaint fail to state a cause of action outside the purview of the Workmen's Compensation Act. Counts V and VI are civil rights claims predicated on the same delay in payments that gave rise to the first four counts of Plaintiffs' Second Amended Complaint. According to the dictates of the Old Republic decision, these allegations cannot overcome the exclusivity of the Workmen's Compensation Act.

The entire basis of Plaintiffs' Second Amended Complaint is grounded upon the alleged intentional delay in paying out disability benefits allegedly due WILLIAM

T. CONNOLLY. The court in Old Republic cited to Sullivan v. Liberty Mutual Insuarnce Co., [sic] 367 So.2d 658 (Fla. 4th DCA 1979), cert. denied, 378 So.2d 350 (1979), in support of its policy of preserving the exclusivity of the Act in cases of mere delay in payments. "The Sullivan [sic] court reasoned that if delay in providing services could become the subject of an independent suit, the legislatively designed exclusivity of the Act would be destroyed." Old Republic, 442 So. 2d at 1079.

Count VII of Plaintiffs' Second Amended Complaint basically seeks a declaration that the 1969, as opposed to the 1981, version of the Workmen's Compensation Act is the applicable law in this case. In addressing Plaintiffs' contention, the Court directs the parties' attention to its order of December 13, 1985 which addressed this same issue. In that Order,

the Court noted that, under the law as it existed in 1969, a workmen's compensation carrier had the immunity of its insured employer. See Carroll v. Zurich Insurance Co., 206 So.2d at 22-23.

> Even though the Legislature ... amended Section 440.11 of the Florida Statutes, F.S.A. [in 1970], to make it clear that a carrier would not be liable in these circumstances, we do not find that the enactment of this statute created an additional immunity to the carrier but merely clarified what already had been held to be the law ...

Id. (quoting Conklin v. Cohen, 262 So.2d 717 (Fla. 3rd DCA 1972)). Since the courts have held that a workmen's compensation carrier has the immunity of its insured employer against a common law action by an employee under Section 440.11 of the Florida Statutes as it existed prior to July 1, 1970, Plaintiffs' argument that it was the 1970 amendment which, for the first time, extended the exclusiveness of liability of an employer

to the employer's worker's compensation carrier must fail. Id.

Plaintiffs contend that prior to the 1979 amendment, authority did not exist under the Act to award an employee "bad faith" remedies against an insurance carrier who deliberately and without justification ceased making compensation payments. Contrary to Plaintiffs' representation, at the time of WILLIAM T. CONNOLLY's work-related injury, the deputy commissioner did have the authority to levy attorney's fees and penalties against recalcitrant insurance carriers who in bad faith refused to timely compensate injured employees. In Andrews v. Strecker Body Builders, 92 So.2d 521, 523 (1957), Florida's Supreme Court reversed and remanded a case to the deputy commissioner where it was found that an insurance carrier was ten weeks delinquent in paying claimant compensation known to be due and

owing. Upon remanding, the Court instructed the deputy commissioner to calculate "the amount of the delinquency ... together with the statutory penalty, interest and attorney's fee" to be awarded the claimant. Obviously, the remedies Plaintiffs now seek were available to the Plaintiffs prior to the enactment of the 1979 amendment. See also State v. Florida Industrial Commission, 151 So.2d 636, 641 (Fla. 1963) (attorney's fees); Martinique Hotel, Inc. v. Kasner, 153 So.2d 68 (Fla. 3rd DCA 1963) (attorney's fees).

Plaintiffs' Second Amended Complaint fails to assert a cause of action beyond the purview of Florida's Workmen's Compensation Act, Fla. Stat. Section 440.11(2); see also Sullivan, 367 So.2d at 661. In reaching this decision, the Court does not intend to create the impression that delays in making benefit payments are condoned by this Court. Rather, the Court

is simply adopting the clear law of Florida which states that the exclusive remedy for all work related claims is the Workmen's Compensation Act. Since all claims alleged in this action arose out of a compensable injury, this Court is compelled to dismiss Plaintiffs' Second Amended Complaint with prejudice.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of February, 1987.

/s/

EDWARD B. DAVIS
UNITED STATES DISTRICT JUDGE

cc: Robert C. Maland, Esq.
Diane H. Tutt, Esq.

ljw

William T. CONNOLLY and Lizabeth V. Connolly, Plaintiffs-Appellants,

v.

MARYLAND CASUALTY COMPANY,

Defendant-Appellee

No. 87-5327.

United States Court of Appeals,

Eleventh Circuit

July 13, 1988.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, Chief Judge, KRAVITCH, Circuit Judge, and HENDERSON, Senior Circuit Judge.

RONEY, Chief Judge:

This lawsuit sought damages against a workers' compensation carrier for allegedly mishandling a compensation claim and intentionally mistreating the injured claimant and his wife in connection with

that claim. The district court dismissed the complaint for lack of subject matter jurisdiction on the ground that the exclusive remedy for a Florida employee covered by workers' compensation insurance is found in the Florida Workers' Compensation Act, Fla.Stat.Ann. Ch. 440, and because there is no civil rights cause of action grounded upon the alleged intentional delay in paying benefits for a compensable injury. We affirm.

The facts as alleged in plaintiffs' complaint, taken as true for the purpose of this appeal, are egregious. William T. Connolly fell from a roof where he was working, was rendered a quadriplegic and is totally and permanently disabled. Maryland Casualty Company was the workers' compensation insurance carrier, upon whom Connolly was totally dependent for financial support and medical care.

Maryland allegedly embarked upon a plan

to make life so miserable for Connolly and his wife, Lizabeth J. Connolly, that he would settle or "wash-out" his workers' compensation claim to rid himself and his family from the defendant's wrongful conduct. Maryland reached an oral agreement with William Connolly regarding benefits to be paid which included a monthly payment in addition to medical care, along with a motorized wheelchair and specially equipped van. Maryland had no intention of fulfilling its obligations pursuant to this agreement. For two years subsequent to this agreement, William made repeated requests for delivery of the van or funds in lieu thereof, which requests were intentionally refused. Connolly was forced to hire lawyers to obtain the van or equivalent funds through legal proceedings, which funds were not provided until some eleven months after the Florida Supreme Court refused to grant certiorari

in Maryland's appeal and after Maryland was further threatened with legal proceedings seeking revocation of its insurance license.

Simultaneous with this conduct regarding the van payments, Maryland intentionally stopped making the monthly payments. After retaining counsel to institute legal proceedings to obtain the wrongfully terminated monthly payments, Connolly received a favorable decision from the deputy commissioner of the Florida Industrial Commission awarding Connolly the previously agreed upon benefits. This decision resulted in a settlement between the parties.

Maryland intentionally inflicted emotional distress on the plaintiffs. Maryland sent representatives to the Connolly home to coerce Mrs. Connolly into convincing her husband that he should fully settle his claim or have his

benefits cut off completely, and that going to court would do no good and should not even be attempted. Simultaneously with the cutting off of all monthly payments Maryland sent Mrs. Connolly checks for $200 per week for "nursing services" rendered to her husband, so as to improperly involve her as a nurse and cause additional strain on the Connollys' marriage.

The seven-count complaint alleged causes of action for tortious breach of contract, fraud, deceit, intentional infliction of emotional distress, civil rights violations under 42 U.S.C.A. § 1985, and declaratory relief.

The problem with all of these claims, however, is that Florida law does not presently allow for an independent cause of action against a workers' compensation carrier for additional damages arising out of a delay in payment of benefits. In Old

Republic Ins. Co. v. Whitworth, 442 So.2d 1078 (Fla.Dist.Ct.App.1983), a workers' compensation insurance company petitioned for a writ prohibiting a state circuit judge from exercising jurisdiction over a suit brought by a workers' compensation claimant for breach of the company's obligation to make timely payments due under the Act. After successfully obtaining relief from the deputy commissioner, the claimant sued Old Republic for having acted in bad faith in delaying disability payments. Florida's Third District Court remanded the case with directions to dismiss the complaint.

The court first noted that the Act provides an exclusive remedy for employee's work related claims, and that a court is without jurisdiction over an employee's claim against an employer, or its compensation carrier, for additional damages for injuries covered by the Act.

Old Republic, 442 So.2d at 1079. The court then held that the injury for which the claimant sought recovery -- Old Republic's alleged bad faith refusal to timely compensate him for his disabilities -- was a compensable one under the Act, one for which the deputy commissioner imposed costs and fees. The court stated that "a compensation claimant cannot avoid the exclusivity of the Act and transform a delay in payments into an actionable tort cognizable in the Circuit Court simply by calling that delay outrageous, fraudulent, deceitful, or an intentional infliction of emotional distress." Id.

In Florida, the exclusiveness of remedy provision precludes an injured employee's spouse from recovery also. See Coney v. Int'l Minerals & Chem. Corp., 425 So.2d 171, 172 (Fla.Dist.Ct.App. 1983). The cases reflect the existing law of Florida, even though Florida does recognize a cause

of action for intentional infliction of emotional distress, Metropolitan Life Ins. Co. v. McCarson, 467 So.2d 277 (Fla.1985), and three out of seven justices on the Florida Supreme Court have expressed support for the proposition that the Act is not the exclusive remedy of an employee against an employer, and presumably against its compensation carrier, who commits an intentional tort within the scope of employment. See Lawton v. Alpine Engineered Products, Inc., 498 So.2d 879, 881-82 (Fla. 1986) (Atkins, J., dissenting); Fisher v. Shenandoah Gen'l. Const. Co., 498 So.2d 882, 884-88 (Fla. 1986) (Atkins, J., dissenting).

Plaintiffs argue that these injuries are not compensable under the Act, since they are neither accidental nor arise out of or in the course of employment, and therefore the Act is not the exclusive remedy. Plaintiffs argue that the 1969

version of the Act governs the substantive issues in this case, see Sullivan v. Mayo, 121 So.2d 424, 428 (Fla. 1960), cert. denied 133 So.2d 647 (Fla. 1961), and that the 1969 version of the Act, unlike the 1981 version which applied in Old Republic, did not expressly provide for a carrier's immunity from suit, or for penalties and attorneys' fees against a carrier for its "bad faith" in handling a claim under the Act, or that the exclusive liability of the carrier was under the Act, as provided for in the 1983 version of the Act.

Plaintiffs are incorrect in arguing that because the 1969 version of the Act may apply that Old Republic's teachings -- that delay in payment of benefits due under the Act is an injury covered by the Act within which the exclusive remedy lies -- cannot apply to them. Immunity from suit extended to the carrier before 1970.

Carroll v. Zurich Ins. Co., 286 So.2d 21, 22-23 (Fla.Dist. Ct.App.1973), appeal dismissed, 297 So.2d 568 (Fla. 1974). See also Sullivan v. Liberty Mut. Ins. Co., 367 So.2d 658, 660 (Fla.Dist.Ct.App.), cert. denied, 378 So.2d 350 (Fla.1959). Although Carroll addressed a carrier's immunity from common law liability for negligence in performing safety inspections, it has not been so limited. See, e.g., Sullivan, 367 So.2d at 660 (immunity for carrier provided in action against carrier for alleged wrongful failure to authorize necessary medical care, which resulted in foot amputation and other injuries to claimant).

One basis for an award of attorney's fees was available to the claimants in Old Republic that was not available to the Connollys: those to a successful claimant where a "carrier has acted in bad faith" in handling a claim. See Fla.Stat.Ann. §

440.34(3)(b). But the deputy commissioner had the authority in 1969 to impose statutory penalties and fees against recalcitrant insurance carriers. See Andrews v. Strecker Body Bldrs., Inc., 92 So.2d 521, 523 (Fla. 1957) (where compensation payments were delinquent, deputy commissioner should have adjudicated the amount of delinquency and directed payment thereof together with statutory penalty, interest, and attorney's fees); Florida ex rel. Iowa Nat'l Mut'l Ins. Co. v. Florida Industrial Comm'n, 151 So.2d 636, 641 (Fla. 1963) (attorney's fees denied to unsuccessful claimant). Fla.Stat. § 440.34(1)(1969) entitled a claimant to attorney's fees under the 1969 version of the Act where a carrier unsuccessfully resisted payment of compensation, regardless of "bad faith". See Fla.Stat.Ann § 440.34(1)(1969). See also Fla. Stat.Ann §§ 440.13, 440.20,

440.24 (1969) (other provisions providing for penalties under 1969 Act). The statutory remedy available to claimants in Old Republic which interpreted the 1981 Act was also available to these plaintiffs, albeit through different provisions. We need not, therefore, address plaintiffs' argument that no post-1969 amendments may be constitutionally retroactively applied to them, since the same result is reached under the 1969 Act without resort to post-1969 amendments.

Plaintiffs attack Old Republic as both legally and factually distinguishable. The plaintiffs argue that the claimant there applied for and received compensation under the "bad faith" provisions of the 1981 version of the Act, so that his injury, unlike theirs, was a compensable one under the Act. Plaintiffs also suggest that Old Republic, unlike the outrageous conduct alleged herein,

involved an action for an insurer's "mere delay" in making payments. Old Republic states, however, that even if labeled an intentional tort, the failure to make prompt payments is a compensable injury and cannot fall outside the exclusive provisions of the Act. This is so without resort to the "bad faith" provisions of the 1981 version of the Act.

In their reply brief, plaintiffs argue that Old Republic has been modified or extended by Bowen v. Aetna Life & Cas. Co., 512 So.2d 248 (Fla.Dist.Ct.App.1987), a case decided after the district court decision. Bowen involved a private contractor doing business abroad under The Defense Base Act,, 42 U.S.C.A. § 1651 et seq. That act incorporates the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq. All Bowen holds is that an action may be maintained for intentional infliction of emotional

distress by an injured worker against a Longshore and Harbor Worker's Compensation Act insurer, where there has been a refusal by the latter to pay benefits. Bowen interprets a federal act, not Florida law.

Contrary to the plaintiffs' argument, there is no constitutional base for their cause of action. The civil rights claims and constitutional claims are all based on the right provided by Florida Compensation Law. Were it not for the alleged conduct required of defendant by Florida law, there would be no ground for asserting civil rights or constitutional claims because of wrongful conduct. The remedy for that wrongful conduct cannot rise above the exclusive remedy provided by the Florida statutes.

Plaintiffs sought a declaration that it would be unconstitutional under various provisions of the federal and Florida

Constitutions to retroactively apply any post-1969 amendments to them. The exclusivity and immunity aspects of the Act mandate that a trial court is without jurisdiction to even consider claims for additional damages over and above the relief that can be obtained from the Industrial Commission. These aspects of Florida law existed before 1970. The district court properly denied plaintiffs' motion for summary judgment as to this Count.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5327

WILLIAM T. CONNOLLY and

LIZABETH V. CONNOLLY,

Plaintiffs, Appellants,

versus

MARYLAND CASUALTY COMPANY,

Defendant-Appellee

Appeal from the United States District Court of the Southern District of Florida

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Before RONEY, Chief Judge, KRAVITCH, Circuit Judge, and HENDERSON, Senior Circuit Judge.

B Y T H E C O U R T:

Appellants' suggestion of certification to the Supreme Court of Florida is DENIED.

Appellee's motion for leave to file a response to the suggestion of certification to the Supreme Court of Florida is GRANTED.

The Petition for Rehearing is DENIED, and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing In Banc is DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-0959-CIV-Davis

WILLIAM T. CONNOLLY and
LIZABETH CONNOLLY,

Plaintiffs

vs.

MARYLAND CASUALTY COMPANY,
a Maryland corporation,

Defendant.
_____/

SECOND AMENDED COMPLAINT

Plaintiffs WILLIAM T. CONNOLLY and LIZABETH V. CONNOLLY sue Defendant MARYLAND CASUALTY COMPANY, a Maryland corporation and allege that:

ALLEGATIONS AS TO ALL COUNTS

1. This is an action for damages in excess of $10,000 and for other relief within the jurisdiction of this Court. Jurisdiction is founded on the jurisdiction of this Honorable Court arising under 28 U.S.C. Sections 1331, 1332(a)(1) and/or 1343.

2. At all times material Plaintiffs were citizens of the State of Florida residing in Dade or Broward Counties, Florida.

3. At all times material some of the actions of the Defendant complained of herein took place in Dade County and/or Broward County in the State of Florida.

4. Defendant MARYLAND CASUALTY COMPANY is a Maryland corporation authorized to do business and doing business in the State of Florida and most particularly in Dade County, Florida.

5. Plaintiff William T. Connolly was injured by accident arising out of and occurring in the course of this employment as an employee of Milton F. Thompson & Sons, in Miami, Dade County, Florida on August 27, 1969 when he fell from a roof on which he was working, was rendered a quadriplegic as a result of said fall and was and is, permanently and totally

disabled by reason thereof.

6. That at the time of the aforesaid accident Defendant Maryland Casualty Company provided to Milton E. Thompson & Sons as the insured, a policy of insurance insuring said insured's employees against various categories of personal injuries and accidental death otherwise commonly known as Workmen's Compensation insurance. A written copy of said insurance policy is not presently available to the Plaintiffs, nor are the terms of said policy actually at issue herein.

7. The wrongful conduct complained of herein and the injuries for which damages are sought herein neither arose out of nor were connected with Plaintiff William T. Connolly's employment. All of the conduct complained of herein and injuries sought to be redressed occurred after the time that Plaintiff William T. Connolly's employment with Milton E. Thompson & Sons

had ceased as a result of WILLIAM T. CONNOLLY's catastrophic injuries as aforesaid.

8. Plaintiff William T. Connolly was a third-party beneficiary of and/or a direct beneficiary of the aforesaid Workmen's Compensation Insurance policy.

9. Subsequent to Plaintiff William T. Connolly having made a claim for benefits under said workmen's compensation insurance policy, the Defendant accepted said claim and provided some benefits to said Plaintiff under the subject insurance policy.

10. All conditions precedent to the bringing of this action have been satisfied.

11. The Plaintiffs have agreed to pay its undersigned counsel a reasonable fee for bringing this lawsuit and the Defendant is obligated to pay the Plaintiffs' attorneys fees.

COUNT I

(TORTIOUS BREACH OF INSURANCE CONTRACT)

Plaintiff WILLIAM T. CONNOLLY sues Defendant MARYLAND CASUALTY COMPANY, a Maryland corporation and alleges that:

12. Plaintiff realleges and reavers each and every allegation contained within paragraphs 1 through 11 above as though fully set forth herein.

13. The Defendant is guilty of egregious conduct amounting to an independent tort with respect to the Defendant's conduct arising after Plaintiff WILLIAM T. CONNOLLY'S employment relationship as above-referenced ceased to exist. The Defendant and its agents embarked upon a plan to make life so miserable for the Plaintiff that Plaintiff William T. Connolly would fully and finally settle or "wash out" his catastrophic workmen's compensation claim to rid himself and his family from the

coercion, horrific and wrongful conduct of the Defendant thereby allowing the Defendant to reduce and conclude its financial exposure arising from said claim.

14. As part of the aforesaid plan in approximately February, 1975 the Defendant and Plaintiff William T. Connolly reached an oral agreement for the provision by the Defendant of benefits to said Plaintiff on the Plaintiff's workmen's compensation claim. Said oral agreement provided, without limitation, that the Defendant would pay said Plaintiff the sum of $2,560.00 each month ($1,650.00 to maintain his household and $910.00 for daily non-extraordinary medical care), to pay for additional extraordinary medical emergencies and care and provide said Plaintiff with a motorized wheelchair and a specially equipped van that would allow him to be mobile and pursue a college

education so that he could ultimately gain a greater sense of financial independence. (Hereafter the foregoing shall be referred to as the "Agreement").

15. At the time the Defendant made the aforesaid commitments and representations, which became a part of the aforesaid agreement, the Defendant was involved in active concealment and/or active misrepresentations and/or deliberate overt and dishonest dealing, as the Defendant did not intend on fulfilling its obligations and commitments as contained within the aforesaid agreement.

16. For a period of approximately two years subsequent to entry into the aforesaid agreement, Plaintiff William T. Connolly and/or his representatives made repeated requests and/or demands on the Defendant for delivery of the specially equipped van and/or funds in lieu thereof to purchase said van, as promised by the

Defendant. The Defendant refused to deliver the specially equipped van or funds to purchase said vehicle. By intentionally not providing Plaintiff WILLIAM T. CONNOLLY with the van as agreed said Plaintiff found it nearly impossible to continue his education due to his lack of mobility. Moreover, because the Defendant had induced said Plaintiff to reduce and limit his "budget" on the promise of a van to enable said Plaintiff to pursue his education, Plaintiff WILLIAM T. CONNOLLY had to rely upon his wife Plaintiff LIZABETH V. CONNOLLY for transportation and care as opposed to professional, trained personnel having both the strength and training to aid Mr. Connolly.

17. As a direct result of the Defendant's intentional, willful and malicious refusal to live up to its own agreement and representations, Plaintiff

William T. Connolly found it necessary to employ attorneys to obtain delivery of this specially equipped van and other benefits or funds to purchase said van.

18. The Defendant's conduct was both wrongful and totally contrary to the purpose of the worker's compensation law as it has long been recognized that the legislative intent was and is that the workers' compensation law should be self executing and that benefits should be paid without the necessity of any legal and/or administrative proceedings.

19. Notwithstanding the Defendant's agreement to pay benefits to the Plaintiff and the aforesaid legislative intent, William T. Connolly had to prosecute legal/administrative proceedings up to and including the Florida Supreme Court, therefrom obtaining a determination requiring the Defendant to provide the van which it had promised, as hereinabove

alleged.

20. The Defendant's treatment of the Plaintiffs was outrageous and odious and far worse than a mere wrongful delay or interruption in the delivery of benefits by a carrier. As further evidence of the Defendant's complete and total disregard of the rights of Plaintiff William T. Connolly the Defendant virtually refused to comply with the requirements of the aforesaid judicial determination that the Defendant provide said Plaintiff with a specially equipped van, for a period of approximately eleven months after the Florida Supreme Court refused Certiorari, rendering final the determination referenced above. It was only after the Defendant was threatened with legal proceedings seeking the revocation of its insurance license that the Defendant complied with the aforesaid judicial determination and delivered to the

Plaintiff funds for the purchase of the specially equipped van.

21. The deliberate, overt and dishonest dealing of the Defendant did not end with the delivery of the funds for the specially equipped van as alleged above. Simultaneously, with delivery of said van funds, the Defendant intentionally stopped making the monthly payments to the Plaintiff William T. Connolly in the amount of $2,560.00 which the Defendant had agreed to make, as hereinabove alleged.

22. The foregoing outrageous, intolerable, willful and intentional withholding of benefits which the Defendant had already agreed to provide to said Plaintiff arose from a continued course of bad faith and dishonest dealing on the part of the Defendant and from a complete disregard by the Defendant of the Plaintiff's rights. The Defendant had

determined as part of its plan to "starve" Plaintiff William T. Connolly into settling his workmen's compensation claim by a wrongful manipulation and withholding of the benefits William T. Connolly had been promised to receive by the Defendant and which plaintiff "William T. Connolly deserved under applicable law and which his family needed to survive as the Plaintiffs and their immediate family were totally financially dependent upon the Defendant. Such intentional wrongful intent to "starve" the Plaintiff into a "favorable" settlement is evidenced, without limitation, by Exhibit A attached hereto and incorporated hereby by reference.

23. As a result of the aforesaid wrongful cancellation of benefits, Plaintiff William T. Connolly again had to obtain counsel and prosecute his claim seeking the payment of those benefits

which were wrongfully terminated by the Defendant, as hereinabove alleged.

24. Plaintiff William T. Connolly obtained favorable decisions from the Honorable William Johnson, Deputy Commissioner awarding to him those benefits which had previously been agreed upon, as well as other benefits including lifetime benefits for medical treatment. Said favorable decisions ultimately resulted in a Settlement Agreement with respect to Workmen's Compensation benefits owing to Plaintiff WILLIAM T. CONNOLLY but not with respect to any of the claims made herein.

25. The Defendant breached its duty of fair dealing and good faith by its intentional, willful, malicious, dishonest and egregious conduct as hereinabove alleged. The Defendant maliciously repeatedly acted in bad faith during the time period referenced hereinabove,

attempted to use the fact of the unequal wealth and bargaining positions of the parties, as well as the complete disability of Plaintiff William T. Connolly and lack of financial resources of said Plaintiff, to effect economic gain to the Defendant by directly and/or impliedly coercing said Plaintiff to accept less benefits than which he was clearly entitled to pursuant to the agreement of the parties and to force the Plaintiff William T. Connolly to settle his claim through the use of said wrongful conduct.

26. As a direct result of the aforesaid wrongful conduct of the Defendant, the Plaintiff suffered mental anguish, anxiety and extreme emotional distress and the Plaintiff's marriage was destroyed and their family unit disbanded. Additionally, Plaintiff WILLIAM T. CONNOLLY suffered a delay in his

educational rehabilitation program as a van and economic support were needed for same) [sic] and damages flowing therefrom.

27. At those times material, Plaintiff William T. Connolly had no means available to him in Florida's worker's compensation system to be compensated for the injuries and damages suffered by him as hereinabove alleged.

28. The CBS television program 60 Minutes aired nationally a documentary on the facts alleged herein as to the mistreatment afforded the Plaintiffs by the Defendant to illustrate the severe abuse which can be imposed upon claimants and their families by unscrupulous and heartless insurance carriers.

WHEREFORE Plaintiff WILLIAM T. CONNOLLY demands the entry of a judgment in his favor and against Defenaant [sic] MARYLAND CASUALTY COMPANY for actual damages in excess of $10,000, together with punitive

damages, special damages, together with costs, interest and attorney's fees and such other and further relief as this Court deems proper and just. Plaintiff demands trial by jury of all issues so triable.

COUNT II

(FRAUD AND DECEIT)

Plaintiff WILLIAM T. CONNOLLY sues Defendant MARYLAND CASUALTY COMPANY, a Maryland corporation and alleges that:

29. Plaintiff realleges and reavers each and every allegation contained within paragraphs 1 through 28 as if each of said allegations were set forth fully herein.

30. As hereinabove alleged the Defendant made false statements concerning specific material facts. That is, that the Defendant would provide to Plaintiff WILLIAM T. CONNOLLY a specially equipped van and the sum of $2,560 each month, and those other benefits as hereinabove

alleged.

31. The Defendant knew at the time it made the aforesaid representations, that said representations were false and that it did not actually intend on fulfilling its representations and obligations under the aforesaid agreement.

32. The Defendant intended that the Plaintiff rely on the aforesaid false statements concerning specific material facts to induce Plaintiff William T. Connolly to enter into the aforesaid agreement.

33. Plaintiff William T. Connolly relied on the aforesaid false statements concerning specific material facts, in the formation of the aforesaid agreement, thereby resulting in his injury as set forth herein.

34. As a direct result of his reliance on the aforesaid false statements concerning specific material facts,

Plaintiff William T. Connolly suffered damages, as set forth herein.

WHEREFORE Plaintiff WILLIAM T. CONNOLLY demands entry of a judgment in his favor and against the Defendant MARYLAND CASUALTY COMPANY for actual damages in excess of $10,000, together with punitive damages, special damages, together with costs, interest and attorneys' fees and such other and further relief as this Court deems proper and just. Plaintiff demands trial by jury of all issues so triable.

COUNT III

(INTENTIONAL INFLICTION OF SEVERE MENTAL AND EMOTIONAL DISTRESS)

Plaintiff WILLIAM T. CONNOLLY sues Defendant MARYLAND CASUALTY COMPANY, a Maryland corporation and alleges that:

35. Plaintiff realleges and reavers each and every allegation contained within paragraphs 1 through 34 above as though

fully set forth herein.

36. The Defendant intentionally and deliberately inflicted severe mental and emotional distress upon Plaintiff William T. Connolly by first reaching an agreement with said Plaintiff for the payment of benefits and thereafter willfully and wantonly refusing to comply with its agreement, thereby requiring said Plaintiff for a period of approximately 6 years to prosecute legal and/or administrative proceedings to obtain those benefits originally promised to him and/or otherwise owing to him as hereinabove alleged and otherwise as alleged herein. Moreover, as hereinabove alleged, the Defendant did not intend on fulfilling its obligations under the aforesaid agreement, as it promised, in order to gain economic advantage and benefit for itself by abusing the incapacity of the Plaintiff and resulting inability of said Plaintiff

to earn a living when he had a family to support. That is, the Defendant treated the Plaintiff dishonestly with the intentional and malicious purpose of creating such severe mental and emotional distress on and within Plaintiff William T. Connolly that he would accept benefits less than those which were promised to him by the Defendant within its agreement and less than those to which he was entitled and to induce Plaintiff William T. Connolly to settle his claim. The wrongful and wanton conduct of the Defendant was done with a deliberate intent to mentally harm Plaintiff William T. Connolly and/or under circumstances where any reasonable person would know that severe mental and emotional distress would arise from the aforesaid wrongful conduct.

37. The wrongful and wanton conduct of the Defendant constitutes conduct that

exceeds all bounds which could or should be tolerated by our society, in that the Defendant attempted dishonestly and fraudulently to take advantage of the misfortune and affliction of Plaintiff William T. Connolly for its own economic advantage and benefit.

38. The wrongful conduct of the Defendant was of a nature specially calculated to cause mental damage of a serious kind. At a time when Plaintiff William T. Connolly suffered from a complete physical incapacity and inability to earn a living to support his family the Defendant intentionally and wantonly stopped paying benefits to said Plaintiff as hereinabove alleged, which benefits said Plaintiff needed to support his family.

39. At the same time it stopped making payments as hereinabove alleged and pursuant to the agreement of the parties

the Defendant was then attempting to force the Plaintiff William T. Connolly to settle his claim through the use of said wrongful conduct. The Defendant sent its agent or representatives into the Connolly family home to indirectly coerce the Plaintiff by advising Mrs. Connolly that she should convince her husband to fully settle his claims with the Defendant or if he did not, the Defendant would cut them off and the Plaintiffs would lose everything they had and that going to Court would do the Plaintiffs no good and they should not even attempt to go to Court. At the same time there was a distinct financial advantage for the Defendant to obtain a full settlement or "wash out" from Plaintiff William T. Connolly so as to limit its financial exposure on said Plaintiffs' claim. If Plaintiff WILLIAM T. CONNOLLY did not accede to a full settlement or "wash out"

then the Defendant would have remained obligated to Plaintiff William T. Connolly for the remainder of said Plaintiff's life.

40. As a direct result of the aforesaid wrongful conduct of the Defendant, the Plaintiff suffered mental anguish, anxiety and extreme emotional distress, the marriage of the Plaintiff was destroyed, their family unit dissolved and Plaintiff WILLIAM T. CONNOLLY suffered a delay in his education rehabilitation program (as a van and economic support were needed for same) and damages flowing therefrom.

WHEREFORE Plaintiff WILLIAM T. CONNOLLY demands the entry of a judgment in his favor and against Defendant MARYLAND CASUALTY COMPANY for actual damages in excess of $10,000, together with punitive damages, special damages, together with costs, interest and attorney's fees and

such other and further relief as this Court deems proper and just. Plaintiff demands trial by jury of all issues so triable.

COUNT IV

(INTENTIONAL INFLICTION OF SEVERE MENTAL DISTRESS)

Plaintiff LIZABETH V. CONNOLLY sues Defendant MARYLAND CASUALTY COMPANY, a Maryland corporation and alleges that:

41. Plaintiff realleges and reavers each and every allegation contained within paragraphs 1 through 40 and paragraphs 51-56 as though each said allegation were fully set forth herein.

42. As hereinabove alleged, simultaneously with its termination of payment to Plaintiff of $2,560 per month, as agreed, the Defendant delivered to the Plaintiffs checks which were upon information and belief, made payable to Lizabeth V. Connolly in an amount

equivalent to $200 per week. The Defendant delivered said checks, allegedly, to compensate Plaintiff Lizabeth V. Connolly for her rendering "nursing" services to Plaintiff William T. Connolly.

43. At the time said checks were delivered by the Defendant the Defendant knew or reasonably should have known that the facts and circumstances surrounding the way the Defendant wrongfully handled the subject claim and otherwise dealt with the Plaintiffs had created great tension in the marital relationship existing between the Plaintiffs and additionally had created mental and emotional trauma to Plaintiff Lizabeth V. Connolly.

44. By sending the aforesaid checks and by otherwise improperly involving Lizabeth Connolly (as there was no obligation whatsoever on Lizabeth Connolly to provide nursing services) the Defendant

intentionally inflicted severe mental distress on Lizabeth Connolly. Lizabeth Connolly was placed in a position of having to reject or return funds that she and her husband desperately needed for the support of their family, thereby confronting said Plaintiff with highly emotional issues and decisions which should never have been raised by and through the Defendant. By sending the aforesaid checks to Plaintiff Lizabeth V. Connolly and by threatening and coercing Plaintiff Lizabeth V. Connolly as more specifically alleged herein the Defendant was wrongfully attempting to add such strain and torment to the marital relationship of the Plaintiffs, that Plaintiff William T. Connolly would capitulate and accept less benefits than which he was entitled and otherwise settle his claim, rather than subject his wife to further mental suffering.

45. Specifically, the Defendant sent its agent or representative, a rehabilitation nurse named Joan Owens, to the home of the Plaintiffs to advise, threaten and coerce Plaintiff Lizabeth Connolly that if her husband William did not settle his claim with the Defendant that the Defendant would retaliate by curtailing or cutting off all benefits thereby causing the Plaintiffs to lose everything they owned and which was important to the Plaintiffs and to advise Plaintiff Lizabeth V. Connolly that going to Court would not do any good and that they should not even try going to Court but should just settle quickly.

46. The delivery of the aforesaid checks and other wrongful conduct as alleged above was designed by the Defendant to wrongfully financially benefit the Defendant at the financial and emotional expense of the Plaintiffs.

47. At those times material, Plaintiff Lizabeth V. Connolly had no means available to her within Florida's workers compensation system to receive compensation for the injuries and damages claimed herein.

48. The Defendant is guilty of the intentional infliction of severe mental and emotional distress with respect to Plaintiff Lizabeth V. Connolly as the Defendant's wrongful conduct as hereinabove alleged was deliberately done with the intent to intentionally harm said Plaintiff and was of such wanton and outrageous character as to constitute conduct that would permit the allowance of punitive damages and constitutes conduct that exceeds all bounds which can or should be tolerated by society and is of a nature specially calculated to cause mental and emotional damage of a serious kind.

49. As a direct result of the Defendant's wrongful conduct as hereinabove alleged, the marital relationship between the Plaintiffs was ultimately broken, the Plaintiffs' family unit was disbanded and Plaintiff Lizabeth Connolly did and does suffer anxiety, worry, severe mental and emotional distress and Plaintiff Lizabeth V. Connolly attempted to take her own life and suffered medical expenses related thereto.

WHEREFORE Plaintiff LIZABETH V. CONNOLLY demands entry of a judgment in her favor and against Defendant MARYLAND CASUALTY COMPANY for actual damages in excess of $10,000, together with punitive damages, special damages and together with costs, interest, attorneys' fees and such other relief as this Court deems proper and just. Plaintiff demands trial by jury of all issues so triable.

COUNT V

(CIVIL RIGHTS CLAIMS - 42 U.S.C. Section 1985(2)

Plaintiffs WILLIAM T. CONNOLLY and LIZABETH V. CONNOLLY sue Defendant MARYLAND CASUALTY COMPANY, a Maryland corporation and allege that:

50. Plaintiffs reallege and reaver each and every allegation contained within paragraphs 1 through 49 above as though fully set forth herein.

51. The Defendants conduct and acts constitute a violation of 42 U.S.C. Section 1985(2).

52. In order to avoid properly bearing all of its financial burdens for catastrophic workers compensation claims (such as and including Plaintiff William T. Connolly's claim herein), the Defendant conspired with Risk Management Services, Inc. and others to prevent seriously injured employee claimants from seeking

vindication of their legal rights and from seeking a recovery of benefits for injuries suffered on the job through the appropriate legal system in the State of Florida.

53. In an effort to effectuate its invidious scheme to obstruct the due course of justice with respect to the claims of seriously injured workers (such as and including Plaintiff William T. Connolly) the Defendant embarked upon a plan of action designed to intimidate and coerce a seriously injured employee claimant to which it clearly owed insurance obligations to not present claims through the appropriate legal system in the State of Florida. Part of the purpose of this invidious conspiracy and scheme was to obtain a full and complete release of all claims (ie. a "wash out") from seriously injured claimants or potential claimants on

financial terms far below the projected financial exposure to the Defendant on said claims and to deny Plaintiff William T. Connolly equal treatment by and access to the appropriate legal system in the State of Florida with the means employed being the attempted denial of the Plaintiff's access to judicial relief. Said invidious conspiracy and scheme particularly was brought to bear upon those workers compensation claims which could by law be fully released (ie. "washed out") as Florida law changed to prevent a complete "wash out" of an insurance company's obligation to pay lifelong medical benefits to permanently injured employees.

54. The intimidation and coercion employed by the Defendant and the other co-conspirators (some of which, upon information and belief, attended the meeting referenced within Exhibit A

attached hereto) was illegal under Florida State law and specifically was designed to make an example of and punish any claimant (in this case William T. Connolly) who did not succumb to the Defendant's scheme and conspiracy to obstruct the due course of justice and not present just worker's compensation claims to the appropriate forum in the State of Florida.

55. Although Plaintiff William T. Connolly alleges, upon information and belief, that the wrongful conduct of the Defendant as alleged herein was maintained because he was a member of a class of individuals similarly situated, William T. Connolly also brings this claim as an individual. Said class refers to catastrophically, permanently injured employees, such as William T. Connolly, whose claims could be fully and completely settled or "washed out" as opposed to claims of lesser magnitude and severity

and claims which could not be completely settled or "washed out."

56. As a result of the wrongful conduct of the Defendant the Plaintiffs were injured and suffered damages as alleged herein

WHEREFORE, Plaintiffs WILLIAM T. CONNOLLY and LIZABETH V. CONNOLLY demand entry of a judgment in their favor and against Defendant MARYLAND CASUALTY COMPANY for actual damages in excess of $10,000 together with punitive damages, special damages and together with costs, interest, attorneys' fees and such other relief as this Court deems proper and just. Plaintiffs demand trial by jury of all issues so triable.

COUNT VI

(CIVIL RIGHTS CLAIM U.S.C. Section 1985(3))

Plaintiffs WILLIAM T. CONNOLLY and LIZABETH V. CONNOLLY sue Defendant MARYLAND CASUALTY COMPANY, a Maryland

corporation and allege that:

57. Plaintiffs reallege and reaver each and every allegation contained within paragraphs 1 through 56 above as though fully set forth herein.

58. The Defendant's conduct and acts constitute a violation of 42 U.S.C. Section 1985(3).

59. The Defendant's invidious conspiracy and scheme was effectuated in part for the purpose of depriving the Plaintiffs either directly or indirectly of equal protection of the laws and/or of equal privileges and immunities under the laws.

WHEREFORE, Plaintiffs WILLIAM T. CONNOLLY and LIZABETH V. CONNOLLY demand entry of a judgment in their favor and against the Defendant MARYLAND CASUALTY COMPANY for actual damages in excess of $10,000, together with punitive damages, special damages and together with costs,

interest, attorneys' fees and such other relief as this Court deems proper and just. Plaintiffs demand trial by jury of all issues so triable.

COUNT VII

(ACTION FOR DECLARATORY JUDGMENT)

Plaintiffs WILLIAM T. CONNOLLY and LIZABETH V. CONNOLLY sue Defendant MARYLAND CASUALTY COMPANY, a Maryland corporation, and allege that:

60. Plaintiffs reallege and reaver each and every allegation contained within paragraphs 1 though 59 above as though fully set forth herein. Additionally, the Plaintiffs proceed pursuant to The Declaratory Judgment Act. 28 U.S.C. Section 2201.

61. This is an action for a declaratory judgment and there is an actual and justiciable controversy between the parties herein. Plaintiffs are in doubt as to their legal and equitable

rights as hereinafter alleged.

62. Florida Statutes Chapter 440 et. seq. (1969) particularly Florida Statutes Section 440.11 (1969) did not expressly state that Florida's Workmen's Compensation Law (a) provided the exclusive remedy for claims of the nature alleged hereinabove and/or (b) for an immunity against liability for those claims alleged hereinabove in favor of a workmen's compensation carrier such as the Defendant herein. A photocopy of Florida Statute Section 440.11 (1969) is attached hereto and incorporated herein by reference as Exhibit A-1.

63. Florida Statutes Chapter 440 et. seq. (1969) governs the substantive rights of the Plaintiffs herein particularly with respect to issues pertaining to the exclusivity of remedy provisions of 440.11.

64. Florida Statutes Section 440.11

(1969) was amended pursuant to Chapter 70-25 Laws of Florida (1970) by the addition of 440.11(2) (1970) which, in effect, extend the exclusiveness of liability of an employer to the employer's Workmen's Compensation insurance carrier. Said Amendment became effective July 1, 1970. A copy of Chapter 70-25, Laws of Florida (1970) is attached hereto and made a part hereof by reference as Exhibit A-2 and a copy of Florida Statutes Section 440.11(1970) is attached hereto and made a part hereof by reference as Exhibit A-3.

65. The aforesaid amendment, Florida Statutes Section 440.11(2) (1970) operated prospectively and therefore had no effect on the substantive rights of the parties herein.

66. As the Defendant herein was not expressly afforded an "immunity" within Chapter 440, et. seq. Florida Statutes (1969) against those claims asserted

against it by the Plaintiffs herein within Counts I through VI supra, the claims contained within Counts I through VI against the Defendant insurance carrier are not barred by the exclusiveness of remedy provision as now contained within Florida Statutes Section 440.11.

67. Additionally, those claims alleged hereinabove by the Plaintiffs within Counts I through VI were not compensable under Chapter 440, et. seq. (1969) Florida Workmen's Compensation Law and therefore did not then and do not now fall within the ambit of said law as, without limitation:

(a) the injuries complained of herein did not arise out of and in the course of the employment of William T. Connolly and in fact arose after the time Mr. Connolly's employment ceased;

(b) the emotional injuries claimed herein not connected with an actual

physical injury suffered in the course of employment are not covered by Florida Workmen's Compensation Law; and

(c) there was and is absolutely no remedy available to the Plaintiffs herein under the applicable Florida Workmen's Compensation Law for those injuries complained of herein particularly the intentional tort claims, which would provide money damages to the Plaintiffs.

68. A retroactive application of any Amendment to Chapter 440 et. seq. Florida Statutes after the date of Plaintiff WILLIAM T. CONNOLLY's injury (ie. on or about August 27, 1969) would be unconstitutional under the facts presented in this case and would (a) violate the provision of U.S. CONST. Art. 1, Section 10 and Art. 1, Section 10 Fla. Const. thereby impairing obligations arising pursuant to contract by making of retroactive effect changes in the law

becoming effective after the date of injury and (b) violate those rights guaranteed tot he Plaintiffs by Art. I Sections 2, 5 and 21, Fla. Const.

69. Any application in favor of the Defendant of the exclusiveness of remedy provision of Florida Statutes Section 440.11 (which by way of Amendment effective July 1, 1970 for the first time applied to workmen's compensation insurance carriers) would be unconstitutional under the facts presented in this case as it would (a) violate the Plaintiffs' rights to access to the Courts and for a remedy for those injuries suffered by them as provided for by Art. I Sections 5 and 21, Fla. Const. and (b) violate the Plaintiffs' constitutional rights including without limitation their rights to equal protection of and due process of the laws guaranteed by Art. I, Sections 2 and 5, Fla. Const. and amend.

I, V and XIV, U.S. CONST.

70. There is no public necessity or purpose which would or should constitutionally allow any provision of Chapter 440 et seq. Florida Statutes to abolish the Plaintiffs' rights to seek redress and monetary damages for the intentional torts and other wrongful conduct alleged to have been inflicted upon them by the Defendant herein.

WHEREFORE, Plaintiffs demand entry of a judgment in their favor and against the Defendant:

(a) Declaring that Florida Statutes Sections 440.11(2) and (3) cannot preclude the Plaintiffs from bringing those claims alleged within Counts I through VI herein; and further declaring that

(b) Florida Statutes Section 440.11(2), the Amendment which first extended the exclusiveness of liability of an employer to the employer's workmen's

compensation insurance carrier did not become effective as law until after the date of Plaintiff WILLIAM T. CONNOLLY's industrial injury and said statutory provision and its progeny do therefore not apply to the Defendant with respect to the claims herein; and further declaring that

c) those injuries alleged hereinabove by the Plaintiffs within Counts I through VI were not compensable under Chapter 440, et. seq. (1969) Florida Workmen's Compensation Law and/or are not now compensable and therefore do not fall within the ambit of said Florida's Workmen's Compensation Law and/or are not now compensible and therefore do not fall within the ambit of said Florida Workmen's Compensation Law as, without limitation:

(i) the injuries complained of herein did not arise out of and in the course of the employment of William T. Connolly and arose after the time of the

cessation of Mr. Connolly's employment relationship;

(ii) the emotional injuries claimed herein not connected with an actual physical injury suffered in the course of employment are not covered by Florida Workmen's Compensation Law; and

(iii) there was and is absolutely no remedy available to the Plaintiffs herein under Florida's Workmen's Compensation Law for those injuries complained of herein which would provide money damages to the Plaintiffs and further declaring that

(d) an application of any subsequent Amendment to Chapter 440 et. seq. Florida Statutes (1969) and particularly 440.11(2) and (3) Florida Statutes and/or any application of the "exclusiveness of remedy" provisions of Chapter 440 et. seq. Florida Statutes is unconstitutional as applied to those facts presented herein as

said application would (a) violate the provisions of U.S. CONST. Art I, Section 10 and Art. I Section 10, Fla. Const. thereby impairing obligations arising pursuant to contract by making of retroactive effect changes in the law becoming effective after the date of Mr. Connolly's industrial injury and (b) violate those rights guaranteed to the Plaintiffs by Art. I Sections 2, 5 and 21, Fla. Const. and would violate the Plaintiffs' rights to access to the Courts and for a remedy, including without limitation the Plaintiffs' rights to seek redress in the form of monetary damages for those injuries suffered by them as provided for in Art. I Sections 5 and 21, Fla. Const. and would violate the Plaintiffs' constitutional rights, including without limitation, the Plaintiffs' rights to equal protection of and due process of the laws guaranteed by

Art. I, Sections 2 and 5 Fla. Const. and amends. I, V and XIV U.S. CONST; and further declaring that

(e) Sections 440.11(2) and (3) Florida Statutes are unconstitutional on their face as said provisions violate Art. I Sections 2, 5 and 21, Fla. Const. and amends. I, V and XIV U.S. CONST. to the extent said provisions abolish a claimant's rights and a claimant's family member's rights to access to the Courts and for a remedy resulting in monetary damages for intentional torts and for the other wrongful conduct of a workmen's compensation insurance carrier subsequent to the date of a claimant's industrial injury and to the extent said provisions would otherwise impair obligations arising pursuant to contract, and to the extent said provisions deny a claimant and a claimant's family members of the equal protection of and due process of law.

(f) Awarding attorneys' fees and cost to the Plaintiffs together with all other relief this Honorable Court deems proper and just under the circumstances.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been mailed this 23 day of December, 1985 to Diane H. Tutt, Esq., 2400 Amerifirst Building, 1 S.E. 3rd Avenue, Miami, FL 33131.

Respectfully submitted,

ROBERT C. MALAND, P.A.
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One Datran Center, Suite 1409
9100 South Dadeland Blvd.
Miami, Florida 33156
(305) 666-4400

/s/
By:_____
ROBERT C. MALAND

(2)

88-1368

Supreme Court, U.S.
FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. _____

WILLIAM T. CONNOLLY and

LIZABETH V. CONNOLLY,

Petitioners

v.

MARYLAND CASUALTY COMPANY,

a Maryland Corporation

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

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12 pp

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SUPPLEMENTAL BRIEF TO PETITION

FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Supreme Court Rule 22.6 WILLIAM T. CONNOLLY and LIZABETH V. CONNOLLY, the Petitioners herein, file this Supplemental Brief to Petition for Writ of Certiorari and pray that this Honorable Court take notice of a new authority which was unavailable at the

time of the last filing.

Petitioners call the attention of this Court to the authority Weatherford v. City of Hialeah, 14 F.L.W. 274, ___ So.2d ___ (February 3, 1989) (Fla. 3d DCA 1989), attached as Appendix B.

Weatherford addresses the second question presented in the previously filed Petition for Certiorari. The issue concerns the lower court's failure to properly and fully render a declaratory judgment.

The Weatherford case is submitted in support of Petitioners' position that plaintiffs who allege sufficient facts reflecting a justiciable controversy are entitled to a declaration, either affirmative or negative in form, including findings of fact and a determination of the rights and duties of the parties. Thus, any opinion which provides the plaintiffs less than such a declaration is

inadequate and must be reversed.

WHEREFORE, Petitioners respectfully pray this Honorable Court include this case and the authorities cited therein, in granting certiorari in the case sub judice.

Respectfully submitted,

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By: _____
ROBERT C. MALAND, ESQ.

By: _____
ROGER M. DUNETZ, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, I am a member of the Bar of this Court and that all parties required to be served have been served with a true and correct copy of the

foregoing Supplemental Brief to Petition for Writ of Certiorari as it was deposited in a United States Post Office with first-class mail, postage prepaid, on this 16th day of February, 1989 and properly addressed to the Clerk of this Court, and to James Tribble, Esq., Blackwell Walker Fascell & Hoehl, Attorneys for Maryland Casualty Company, 1 S.E. Third Avenue, Suite 2400, Miami, Florida 33131, and to the Hon. Robert A. Butterworth, Attorney General for the State of Florida, the Capitol, Tallahassee, Florida 32301

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By: _____
ROBERT C. MALAND, ESQ.

BRUCE C. WEATHERFORD, JR.,

Appellant,

vs.

THE CITY OF HIALEAH,

Appellee

BRUCE C. WEATHERFORD, JR., Appellant, vs. THE CITY OF HIALEAH, Appellee, 3rd District [Court of Appeal of Florida], Case No. 87-1460. Opinion filed January 24, 1989.

(Before HUBBART and DANIEL S. PEARSON and FERGUSON, JJ.)

(PER CURIAM.) The issue in the trial court on a complaint for declaratory judgment action was: Where an employee of a self-insured municipality, rendered permanently and totally disabled in a job-related accident, is limited by municipal law to 75% of gross salary in early retirement pension benefits including

workers' compensation benefits, may the municipality recover, in set-offs against periodic pension payments, more than the actual amount paid to the employee as a lump-sum settlement of a workers' compensation claim? Resolution of the question requires a construction of municipal laws, an employment contract, and a settlement agreement.

The final judgment on review here disposed of the case without findings of fact or conclusions of law, stating only that "... Plaintiff, BRUCE WEATHERFORD, JR., take nothing by this action and the Defendant go hence and recover costs to be hereinafter taxed."

As a result of an accident which occurred in the course and scope of his employment, police officer Bruce C. Weatherford, Jr., was rendered totally and permanently disabled. He was pensioned off on June 21, 1977 pursuant to Section

24-14, City Code of Hialeah, which provides:

> [A]n employee whose total disability extends beyond the twenty-six week period prescribed in Section 24-13 shall continue to receive for his period of total disability an amount of money which shall equal seventy-five percent of his gross salary at a time of injury, taking into consideration benefits from workmen's compensation, if any, benefits derived from the general retirement system, section 24-17, and compensation provided from "permanent total disability fund" created by section 24-16 ... (Emphasis added [in original].)

By an order dated April 7, 1975, Officer Weatherford settled his claim for workers' compensation benefits and accepted a lump-sum payment of $9,000. When the pension payments started, the City began to deduct $160 from his bi-weekly pension benefits of $307.50 as if bi-weekly workers' compensation benefits were being paid. Section 24-15 of the City Code is relied on as authority for the deduction of amounts equal to the weekly workers' compensation benefits

Weatherford would have received but for the settlement. It provides:

> In the event a disabled employee elects to accept a lump sum settlement from workmen's compensation, the amount he will receive under the provisions of this article shall be as specified in section 24-14 based upon the amount of workmen's compensation he would have received on a weekly basis had he not elected to accept the lump sum settlement ...

When the complaint was filed, deductions from Weatherford's bi-weekly pension for the workers' compensation award had exceeded $38,000. Weatherford claims that the deductions should have terminated after an amount equal to the $9,000 lump-sum settlement award had been recouped by the City. The City counters that the deductions should continue as long as it is obligated to make the pension payments. In answer to Weatherford's contentions on appeal, the City also assets affirmative defenses -- that the action is precluded by res

judicata and barred by the statute of limitations. We must, however, address the issue on the merits because no affirmative defense appears on the face of the complaint and none was either pleaded or proved.

In City of Hialeah v. McGrath, 378 So.2d 798 (Fla. 3d DCA 1979), we construed the same City Code provision -- section 24-14 -- and concluded that the City did not have the right to withhold from disability retirement pension payments, any monies paid by the City to the former employee under the Workmen's Compensation Act. In McGrath the parties had entered into a stipulation for settlement of all matters growing out of the workers' compensation action and the City had not, by terms of the stipulation, specifically reserved any right to set-off the lump-sum payment of workers' compensation benefits against pension benefits.

In our view, Weatherford's complaint for declaratory relief alleged sufficient facts reflecting a justiciable controversy, see generally Bryant v. Gray, 70 So.2d 581 (Fla. 1954); Grable v. Hillsborough County Port Auth., 132 So.2d 423 (Fla. 2d DCA 1961), therefore he was entitled to a declaration, see Duran v. Wells, 307 So.2d 259 (Fla.2d DCA 1975) -- either affirmative or negative in form. See Local 532 of Am. Fed'n of State, County and Mun. Employees v. City of Ft. Lauderdale, 273 So.2d 441 (Fla. 4th DCA 1973); City of Miami v. Franklin Leslie, Inc., 179 So.2d. 622 (Fla. 3d DCA 1965). An adjudication that the plaintiff "take nothing by this action" is inadequate. See, e.g., Breuil v. Hobbs, 166 So.2d 825 (Fla. 3d DCA 1964) (in action for declaratory judgment court required to make findings of fact and propound an order determining rights and duties of

parties under agreements).

In the absence of a declaration of rights -- to which the plaintiff is entitled -- and a showing by the evidence why our holding in McGrath is not controlling here, the judgment must be reversed. See Lewis v. City of Atl. Beach, 467 So.2d 751 (Fla. 1st DCA 1985).

Reversed and remanded for further proceedings consistent with this opinion.